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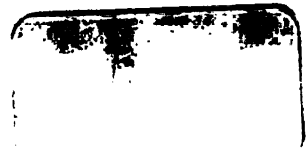

Henry Smith
17th Dec 1864

A TREATISE

ON THE

LAW OF SLANDER, LIBEL, *SCANDALUM MAGNATUM*, AND FALSE RUMOURS;

INCLUDING

THE RULES

WHICH REGULATE INTELLECTUAL COMMUNICATIONS

AFFECTING THE

CHARACTERS OF INDIVIDUALS

AND THE

INTERESTS OF THE PUBLIC,

With a Description of the Practice and Pleadings in personal Actions, Informations, Indictments, Attachments for Contempts, &c. connected with the Subject.

By THOMAS STARKIE, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

"Our Law in this and many other Respects corresponds rather with the middle Age of Roman Jurisprudence, when Liberty, Learning, and Humanity, were in their full Vigour, than with the cruel Edicts that were established in the dark and tyrannical Ages of the ancient Decemviri or the later Emperors."—*Blackstone's Comm. vol.* 4. *p.* 151.

"The Pleadings of the Parties are in this Action much to be heeded, for the Plaintiff or Defendant either of them in this may by his Omission or Commission very quickly advantage or prejudice himself, and therefore they must be very careful herein."—*Sheppard. Actions for Slander, p.* 260.

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TO

THE RIGHT HONOURABLE

EDWARD LORD ELLENBOROUGH,

CHIEF JUSTICE OF ENGLAND,

&c. &c.

My Lord,

I have the honour to submit to your Lordship an humble attempt to illustrate an extensive and important branch of English Jurisprudence, by reducing, under a systematic arrangement, a selection of the principal decisions relating to it, interspersed with the dicta and opinions of many learned and experienced Judges.

In the execution of this plan, your Lordship's judgment, (if exercised at all on such a subject) will, I fear, detect many faults; my regret will be severe should their number or their quality induce your Lordship to repent of your kind permission to inscribe this treatise to yourself.

In hopes that your Lordship will long enjoy the high honours with which your professional career has been crowned, in the full possession of those faculties in which the nation claims so large an interest, I beg leave most respectfully to subscribe myself,

Your Lordship's most obedient,

And very humble Servant,

THOMAS STARKIE.

9, *Searle-street, Lincoln's-Inn.*

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CORRIGENDA.

Page 7, line 6, for "from this difficulty" read *to this difficulty.*
12, —— 8, for " and may require" read *and such limits may require.*
20, —— 1, for " an action may be" read *actions have been.*
34, —— 24, for " deprivations" read *deprivation.*
101, —— 13, for " referrible" read *referable.*
147, —— 11, dele " the prejudice from."
165, last line but four, for " for" read *of.*
184, —— 8, for " loses" read *is prevented from succeeding to.*
196, —— 16, for " should be" read *should have been.*
196, —— 19, for " plaintiff's" read *defendant's.*
198, —— 27, for " perplexities" read *perplexity.*
209, —— 3, for " but" read *and*
231, —— 18, for " defendant" read *plaintiff.*
318, —— for " Birch" read *Beech.*
345, —— 10, dele " and."
347, last reference but one, for " 3 Bac. Ab " read 4 *Bac. Ab.*
347, line 12, for " or circumstance" read *of knowledge.*
363, —— 9, for " announce" read *announced.*
363, first reference, for " Johnson v. Sutton" read *Sutton v. Johnstone*
386, last line but four, add a reference to 1 T. R. 748.
404, for " Cambden" read *Camden.*
419, last line but three, for " of" read *by.*
420, in the notes, for " R. v. Walton, 1 Cowp." read *R. v. Watson*, 1 *Camp.* 214.
443, line 21, dele " who."
523, —— 19, for " falling in within" read *falling within.*
532, —— 4, dele " the interests of."
593, last line, for " Tr. R. 1 Geo. 3." read *Tr. T.* 1 *G.* 3.
560, line 7, for " written with" read *within.*
561, first ref. read *Dig. L. L.* 16. *Bac. Ab. tit. Lib.* 456.
564, first ref. dele " 2 Esp. R. 226." insert *R. v. Cator*, 4 *Esp.* 117.
568, —— 7. for " law of the country" read *law of this country.*
570, —— 7, for " latter" read *defendant.*
610, for " Cambden" read *Camden.*

INTRODUCTION.

INJURIES which exist, independently of the violation of any previous compact, are either forcible in their nature, where the means used are purely mechanical, or intellectual, where the wrong is completed by the mere communication of certain ideas.

The sources of these two kinds of injury are so remote and characteristic, as to induce a mere theoretical inquirer to conclude that, in any given system, the laws relating to them, whether remedial or prohibitory, would at the same period approach nearer to perfection in the first instance than in the second.

The comparative imperfection of the laws relating to the latter division, is suggested principally by two considerations—the want of early experience, and the intrinsic difficulty of the subject.

In the progress of a nation from a state of rudeness to civilization, it is natural to suppose, that the protection of the persons and property of individuals from actual violence would be the first and most important object of legislation.

Mere intellectual injury is of too abstracted a nature to invite early attention, and the necessity of prescribing restraints to any consider-

able extent would not obtrude itself until society had begun to assume a complicated form. This necessity has its origin chiefly in the various distinctions and refinements which prevail in the maturer stages of society: previous to their introduction, and particularly whilst the art of writing was either altogether unknown, or confined to a few, the injury could seldom extend beyond mere personal reflections and abuse; and instances even of this description would be the less frequent, from the probability that the offended party, in the absence of a competent tribunal to which he might appeal, would redress his own wrongs, and retaliate by acts of personal violence. Reputation itself, considered as the object of injury, owes its being and importance chiefly to the various artificial relations which are created as society advances.

The numerous gradations of rank and authority, the honours and distinctions extended to the exertion of talent in the learned professions, the emoluments acquired by mechanical skill and ingenuity, under the numerous subdivisions of labour, the increase of commerce, and particularly the substitution of symbols for property in commercial intercourse—all, in different degrees, connect themselves with credit and character, affixing to them a value, not merely ideal, but capable of pecuniary admeasurement, and consequently recommending them as the proper objects of legal protection.

The difficulties to be encountered in framing such laws is a further reason for their imperfection; their subject matter is more subtle and refined, and does not admit of the broad and plain limits and distinctions which may be established in respect of forcible injuries; for instance, in the case of battery of the person, the law can, without hesitation, pronounce, that any the least degree of violence shall be deemed illegal, and entitle the complainant to his remedy; but, communications concerning reputation cannot be so prohibited: every day's convenience requires, that men, and their affairs, should be discussed, though frequently at the hazard of individual reputation; and it conduces mainly to the ends of morality and good order, to the safety and security of society, that considerable latitude should be afforded to such communications. The dread of public censure and disgrace is not only the most effectual, and therefore the most important, but in numberless instances the only security which society possesses for the preservation of decency and the performance of the private duties of life.

The law may, indeed, define particular offences, and diminish their frequency by the threat of punishment; but it cannot define, and therefore cannot compel, an observance of the duties, upon the discharge of which the happiness of the community most essentially depends. It is possible, in short, for a strict observer of every legal enact-

ment to be destitute of every honourable feeling and principle, and utterly unfit for supporting any useful relation to the society in which his existence is tolerated.

There are, it is true, other and strong motives for good conduct; but, however powerful such are or ought to be, common experience proves, that their practical operation upon the mass of mankind, is weak when compared with the love of character, and strongly suggests, even to a superficial observer, the state of things which would ensue were praise and blame to become alike indifferent. Hence it is that the very liability of reputation to public censure tends, in a very considerable degree, to the preservation of its purity.

Again, this privilege is important, not only as it diminishes the number of delinquents, but as it abridges their power of effecting mischief, since to expose bad intentions, is the surest step towards preventing their execution. It seems, indeed, to be just as much a matter of moral obligation to admonish an individual against the malpractices from which he is likely to suffer, as to apprize him that he is unwarily approaching the edge of a precipice; but it is impossible to contend, that a law controulling the exercise of any moral feeling, can consist with reason and good policy.

In addition to this, from the very nature of the case, such a prohibition would be in a great measure nugatory: the passion for communication is

too powerful to be extinguished by any penal enactments, though the attempt to enforce them would materially impede and embarrass the ordinary intercourse and business of society.

So with regard to matters of public concern: the cause of good government, of religion, or science, may sometimes partially suffer from the propagation of wilful misrepresentation and the dissemination of vicious principles, yet it can scarcely be doubted that these very interests are best consulted by permitting free inquiry for the attainment of truth and dispersion of error. The professed end and object of every political institution, is the advancement of the public welfare; of every philosophical system, the extension of human knowledge. Whoever, therefore, fairly points out a defect, or error, in the one case or the other, necessarily confers a benefit on society, since he suggests the means by which its condition may be improved. To interdict all discussion on such subjects, would be to embrace one of these alternatives—either indiscriminately to reject the advantages to be expected from the future exertion of talent, aided by experience, or unwisely to assume the present state of things to be so perfect as to exclude any alteration for the better.

The convenience, however, of society, undoubtedly requires that some limit should be prescribed to communications affecting the reputation of indi-

viduals, and the general interests of the community.

The means which have been invented for the transmitting and perpetuating ideas, otherwise fleeting and perishable, are convertible into the powerful instruments of wanton mischief. The safety of the public may be undermined by the diffusion of vicious principles, artful calumnies, or obscene ribaldry; its peace disturbed by acts of outrage, inflicted in revenge for personal reflections and affronts; the happiness and prosperity of the individual impaired by imputations disgracing him as a man, and depriving him of the comforts of society; or affecting his credit and abilities in any particular character, and excluding him from the enjoyments of the honours and emoluments incidental to his situation in life.

Since experience proves, that such may be the fatal consequences of malice thus exerted, the means by which they are effected are properly the object of legal coercion and restraint.

The difficulty, then, is obvious; it consists in laying down plain intelligible rules, by which the privilege of communication is to be limited and defined, and in so adjusting the boundaries, that the common concerns and ordinary transactions of life may not be fettered by irksome and unnecessary restraints; that every member of the community may feel himself at liberty to give a fair and honest

opinion upon every subject in which he possesses an interest, without the apprehension of a suit or prosecution, and yet that the impunity shall not be extended to publications maliciously contrived for the purpose of public or of private mischief.

From this difficulty, as far at least as relates to political and theological topics, the awkward expedient of subjecting the press to the controul of a licenser owes its origin—a measure scarcely plausible even in its exterior, and replete with mischief and absurdity. The advantage to the community would be infinite, could any organ of communication be discovered, which would faithfully transmit to the public every sentence capable of improving and delighting, but repress every gross and pernicious sentiment. The difficulty consists in discovering such a literary alembic. In whom are united the talents requisite for the task? Does the possessor of them superadd an integrity and impartiality liable to no influence, prejudice, or bias? Who is competent to judge of such high qualifications? Where shall the power of appointment reside?

A writer*, no less remarkable for the acuteness of his observation than for the energy of his language, has thus expressed himself upon the subject.

"If nothing may be published but what civil authority shall have previously approved, power

* Johnson's Life of Milton, 104.

must always be the standard of truth: if every dreamer of innovations may propagate his projects, there can be no settlement: if every murmurer at government may diffuse discontent, there can be no peace: and if every sceptic in theology may teach his follies, there can be no religion. The remedy against these evils is to punish the authors, for it is yet allowed, that every society may punish, though not prevent, the publication of opinions which that society shall think pernicious: but this punishment, though it may crush the author, promotes the book; and it seems not more reasonable to leave the right of printing unrestrained, because writers may be afterwards censured, than it would be to sleep with doors unbolted because by our laws we can hang a thief."

The concluding comparison indicates the leaning of its author in favour of the previous restriction. The utility and justice of the comparison itself, however, appear questionable. No man in his senses, it is true, would invite danger by leaving his door open, since he might lose and could not gain by the experiment; and security on the one hand is opposed to danger on the other.

And so in case danger, political or religious, were to to be apprehended from an open press, and no inconvenience were likely to arise from restraining it, no one could doubt the propriety of such restraint; and to leave the press unrestricted because an abuse of the liberty might afterwards be

punished, would be as silly as to leave the door unbarred, because the thief might be hanged. If the comparison be meant to extend no further than this, it is useless, since it merely illustrates a fictitious case which does not admit of doubt; if it be meant to extend further, its application is unjust, since the danger to be apprehended from an open press is opposed, not to security, but to the danger to be dreaded from making power the standard of truth. The advocate for an open press assigns for his reason, not that an offender may be afterwards punished, but that he apprehends greater mischief from the restriction than from the abuse of the liberty: each side of the alternative presents its inconveniences, and the only question is, which is the more tolerable, to see no truth but through the the suspicious medium of power, or to risk the disorders and scepticism which may flow from a press unfettered by previous restriction.

That a free press is the surest protection against the inroads of arbitrary power, is a position which may almost be regarded as a political axiom. Under a government where communication is shut out, the individual suffers in silence; innovations are securely practised upon what remains of his liberty; his knowledge is confined to his own grievances; and to proclaim them aloud, and singly and unassisted to demand redress, is too dangerous a measure for the stoutest resolution.

By means of the press every movement of power

is announced to the community; the effects of every measure scrutinized by the united talents of the whole; every individual learns the extent of every public grievance, and is animated in his resistance to the oppression by the confidence which the support of numbers never fails to inspire.

The security thus afforded is valuable in proportion to the value placed upon liberty itself, and is an advantage singly sufficient to outweigh the opposite evils, were they more real than experience has proved them to be*.

An important distinction relating to this topic still remains. There is a wide difference between an open press, that is, a press not subject to the previous control of a licenser, and a free press; and yet it is remarkable, that these are treated† by a very eminent writer upon our constitution, as identical. Does the removal of previous restraint necessarily and essentially constitute a free press? May not the pains and penalties inflicted for that which has been published be so unwarrantably severe as to prevent future publications?—To take an extreme case:—Suppose a government claiming no previous right of restraint, to punish with loss of life or limb for publications abstractedly innocent, could the press in that country be deemed free? If not, then it is clear, that something more

* It is now upwards of a century since the press of this country was finally rescued from the hands of a licenser.

† Sir W. Blackstone's Com. vol. 4. 151.

than the mere absence of previous restraint is essential to the liberty of the press.

This further requisite consists in laying down plain intelligible rules, adapted to the exigencies and convenience of society; without such guides, the most perplexing uncertainty must prevail, and it may fairly be questioned, whether the alternative of a licenser, whose office, however odious, at all events secures from punishment, by preventing the publication of that which he deems offensive, be not preferable to the permission to publish, where the effect of publishing is hazardous and uncertain.

Civil liberty has been well defined*, to consist in "The not being restrained by any law but what "conduces, in a greater degree, to the public good." Were a set of laws, therefore, to be constructed upon this foundation, for regulating the extent of the privilege of communication, so as to consist with the fullest enjoyment of civil liberty, their operation would produce the greatest aggregate of good; so that were a greater latitude allowed, the mischief would outweigh the advantage resulting from freer communication: were the privilege more contracted, the additional security would not compensate for the increase of litigation, and the partial loss of the benefits afforded by free discussion; or in either case, an inconvenience would accrue from

* Paley's Philosophy, vol. 2. p. 164.

relinquishing a plain well-defined rule for one uncertain and precarious. To determine, therefore, with precision, the limits of verbal and written communication, is a problem easy of enunciation, but exceedingly complicated in its solution: it involves the consideration of the habits, manners, and even fancies and prejudices of the people for whose government it is intended, and may require alterations corresponding with the changes effected in the state of society. Before mercantile convenience, for instance, had created what is termed credit, an imputation of insolvency could produce little prejudice, yet after the establishment of commerce, it might largely contribute to its own verification; and it would not be difficult to cite terms of reproach, which in one age would exasperate and provoke to acts of violence, but in another, would meet with disregard and indifference.

TO INQUIRE WHAT LIMITS HAVE BEEN PRESCRIBED BY THE LAW OF ENGLAND TO THE COMMUNICATION OF IDEAS OF ANY DESCRIPTION, WHETHER OF FACTS OR OF OPINIONS, WHICH MAY AFFECT THE CHARACTERS OF INDIVIDUALS, OR THE INTERESTS OF THE PUBLIC, AND THE MODE BY WHICH ITS REGULATIONS ARE TO BE ENFORCED, IS THE OBJECT OF THE PRESENT TREATISE.

In pursuing this investigation, the following method is proposed to be observed.

1st. To reduce the subject into the most simple

divisions of which it is capable, with reference to the general principles and distinctions recognised by the Law of England.

And 2dly. To endeavour, from the particular cases which range themselves within each of such divisions, to extract such principles and positions as may serve to define and ascertain the limits and boundaries of this branch of the law.

In the first place it is necessary, for the sake of clearness, to advert to the well-known distinction between private and public wrongs: in the former case, the object of the law is to compel a reparation to the injured individual, for a specific loss; of the latter, to prevent, by dread of punishment, an attempt to produce disorder in society. The foundation, therefore, of proceeding in the two cases, is perfectly distinct; and the means used by the law for the attainment of such different objects are, as might be expected, dissimilar.

In some respects, it is true, the corresponding incidents are nearly related; but upon the whole, a separate consideration, even of these, appears preferable, particularly since repetition may be avoided by reference, and the advantage derived from viewing the two branches in their mutual bearings may be attained by subsequent comparison.

The subject will therefore be considered,

1st. In its relation to individuals.

2dly. In its relation to the interests of the public.

In considering the subject as it relates to individuals, it will be convenient to inquire,

1st. Under what circumstances an individual is entitled to recover damages for any communication concerning him.

2dly. The means appointed by law for obtaining such damages where the party is entitled; and the means of defence where a party sues who is not so entitled.

1st. Under what circumstances is an individual entitled to recover damages for a communication concerning him?

An action to recover damages in case of slander, rests upon the grounds and principles of Common Law; and though the legality of such a proceeding has been recognized by statutes regulating the costs and limiting the time of complaint, the right to redress exists independently of the written law. To this observation the proceeding by action of SCANDALUM MAGNATUM seems to form no exception, since the statutes relating to that offence rather secure an existing right by new penalties than create a title to damages. (1 West. 3 E. 1. c. 34. 2 R. 2. c. 5. 12 R. 2. c. 11. *Lord Townsend v. Dr. Hughes*, 2 *Mod.* 150.)

The Law of England, in its ample and equitable provision of remedies, prescribes, generally, that "WHERE A MAN HAS A TEMPORAL LOSS OR DAMAGE BY THE WRONG OF ANOTHER, HE SHALL HAVE AN ACTION ON THE CASE TO BE RE-

PAIRED IN DAMAGES." (1 Com. Dig. 168. Bac. Ab. tit. Actions. B.)

In order therefore to constitute a right of action, at Common Law, two circumstances must concur; first, a loss must have been sustained by the plaintiff; and secondly, the loss must have been occasioned by the wrongful act of the defendant.

The first question, therefore,—When is an individual entitled to recover damages for any communication concerning him? resolves itself in two considerations: 1st. When shall a man be said to have suffered a TEMPORAL LOSS from a communication concerning him? 2dly. When shall the act of communication be deemed a WRONG?

OF THE PLAINTIFF'S LOSS.

CHAPTER I.

WHEN shall a man be said to have suffered a TEMPORAL LOSS from a communication concerning him?

Since the remedy sought to be recovered by a personal* action in a court of law is of a pecuniary nature, it follows, that the loss complained of, ought to admit of a pecuniary admeasurement. The term *temporal*, used as descriptive of the loss upon which a suit may be supported, seems particularly opposed to *spiritual grievances*†, which cannot be estimated in money, and for which, a remedy must be found, if at all, under a jurisdiction very differently constituted; and so, a mere injury to the feelings without actual deterioration of person or property, cannot form an independent and substantive ground of proceeding, though in other cases it may materially influence a jury in their assessment of damages.

In general, then, it is necessary to prove a specific loss to have been sustained, by the evidence

* I. e. in an action upon the case. † 4 Co. 16.

of which a jury is to be guided in assessing pecuniary damages: with respect to this rule, however, the case of slander exhibits a remarkable exception, many communications being deemed actionable without proof of special loss.

This dispensation is grounded upon the strong presumption of loss supplied by the injurious quality of the communication, and the necessity for administering a speedy remedy.

The nature and force of these reasons will be best illustrated by examples. Suppose insolvency to be imputed to a merchant or banker: if he were compelled to wait until he could come prepared with proof of a specific loss sustained in consequence of the slander, the legal remedy would frequently arrive too late.

The natural and probable effect of such a report, is *immediate*, and increasing prejudice, the slander itself affording a violent presumption, that damage either has or will accrue to the object of it; the hardship would therefore be great, were he to be excluded from the courts by the difficulty, peculiar to his case, of providing the precise measure of legal evidence, until the evil had become inveterate, and his affairs irretrievable.

So in the remarkable case where an imputation is thrown upon the plaintiff likely to induce his ancestor to disinherit him; no loss can in such case actually arise, until by the death of the ances-

tor the disinherison shall have become complete; but, were the plaintiff compelled to wait till then, it would frequently be impossible to apply a remedy; the intermediate death of the wrong-doer, or his inability to make compensation, might leave the injured party without legal resource. By dispensing with the usual strictness of proof, and considering imputations which afford strong presumptive evidence of damage, as sufficient grounds of action, the evils of the nature alluded to are avoided, and by an early refutation of the calumny the ultimate effects of it averted; and though the defendant in such an action cannot be looked upon as an object of indulgence, yet the interests of all parties seem better consulted by allowing cognizance of the matter at an early stage, when a slight reparation may arrest the progress of the mischief, and restore the injured party to his right, than by waiting till the damage shall have become more serious, and the remedy more difficult and uncertain.

The jurisdiction of courts of law, in actions for slander, has for its immediate object the enforcing a compensation in damages for a loss sustained; but this necessarily includes a collateral means of relief, in many instances more efficacious than the principal remedy claimed, since an opportunity is afforded to the party of openly rebutting the calumny, by challenging investigation in the face of the country,—a matter frequently of more serious

importance than the recovery of damages, and an advantage which could not be so well obtained by other means; and though, as already observed, this mode of relief be but incidental to the main end, yet its evident convenience furnishes a strong reason for relaxing somewhat of usual strictness for the sake of extending it.

The consideration of the plaintiff's loss, therefore, affords two subjects for inquiry:

1st, In what cases and upon what grounds does the law presume a loss to the plaintiff from the slander?

2dly, Where a specific loss must be proved, how must such specific loss be connected with the slander?

1st, In what cases and upon what grounds does the law presume a loss to the plaintiff from the slander?

The general distinction of law as to the necessity of shewing special damage in such cases is, that "where the natural consequence of the words is a damage; as if they import a charge of having been guilty of a crime, or of having a contagious distemper, or if they are prejudicial to a person in an office, or to a person of a profession or trade, they are in themselves actionable; in other cases, the party who brings an action for words, must shew the damage which he has received from them*."

* 6 Bac. Ab. 205.

From the books, it appears, that ~~an~~ action~~s may~~ have been ~~be~~ maintained without proof of special damage in the following cases.

Where a person is charged with the commission of a crime.

Where an infectious disorder is imputed.

Where the imputation affects him in his office, profession, or business.

Where the matter charged tends to the party's disinherison, or affects his title to land.

Where the slander is propagated by printing, writing, or signs.

In cases of *scandalum magnatum.*

It will be considered, under each of these divisions, by what rules the extent of the action in each case is limited, and the reasons upon which they are founded.

1st. Where a person is charged with the commission of a crime.

Here it may be considered,

1st. *What must be the nature of the offence imputed.*

2dly. *In what manner and terms it must be imputed.*

1st. What must be the nature of the offence imputed.

The action for scandalous words, though of high antiquity, was formerly so little resorted to, that between the first and fifth years of the reign of Ed-

ward the third, not more than three instances occurred*.

From the commencement however of the reign of Elizabeth, such actions, especially for words containing an imputation of crime, began to multiply with great rapidity, a circumstance chiefly attributable to the increasing encouragement which they met with in our courts. No settled rule ascertaining their limits, seems however to have been established at any early period, and the host of conflicting decisions to be met with in the books, exhibit convincing marks of the precarious and fluctuating principles on which they were grounded.

A struggle between two opposite inconveniences, seems to have created this wavering in the minds of the judges. The fear of encouraging a spirit of idle and vexatious † litigation, by affording too great a *facility* to this species of action, was contrasted with the mischief resulting to the public peace from refusing legal redress to the party whose reputation had been slandered, every day's experience teaching, that the remedy, denied by our courts, would most surely be sought after by acts of personal violence. Accordingly it appears, that as the former or latter of these considerations preponderated, a more rigid or relaxed rule of decision was adopted by the judges‡.

* According to Coke, C. J. 3 Bulst. 167.

† 6 Mod. 24.

‡ Out of 200 successive cases, taken at random in Croke's

In Edward's case*, the defendant had charged the plaintiff with having attempted to burn the defendant's house; and the court were of opinion, that the charge was actionable, assigning, generally, as the reason, that "*by such speech the plaintiff's good name is impaired.*"

In Stanhope v. Blith†, the words were—"M. Stanhope hath but one manor, and that he hath gotten by swearing and forswearing;" and Wray, C. J. said, "that though slanders and false imputations are to be suppressed, because many times *a verbis ad verbera perventum est;*" yet he said, "that the judges had resolved, that actions for scandals should not be maintained by any strained construction or argument, nor any favour given to support them; forasmuch as in these days they more abound than in times past, and the intemperance and malice of men increase, *et malitiis hominum est obviandum:* and in our books *actiones pro scandalis sunt rarissimæ;* and such as are brought are for words of *eminent slanders and of great import;*" In Smale v. Hammon‡, the words were, "thou

Reports of cases in the reign of Elizabeth, 15 consist of actions for words,—a proportion somewhat greater than that of one in fourteen. If, upon the average, it be supposed that each individual case of the two classes occupied the same time, it will follow, that one day out of every fourteen, must have been devoted by the court to this unprofitable species of discussion.

* Cro. Eliz. 6.

† 4 Co. 15.

‡ 1 Bulst. 40.

wert forsworn, and I can prove it." Upon motion in arrest of judgment, Williams, J. said, "this rule is to be observed as touching words, which are actionable; that is to say, *where the words spoken do tend to the infamy, discredit, or disgrace of the party, there the words shall be actionable.*" *And the rule was affirmed by the court.*

Yet so little was this rule regarded, that in the very next case which occurred, where the words were* "thou wert in gaol for robbing such an one on the highway," the court differed in opinion; and Fenner, J. held, that if one saith of another, "thou art as very a thief as any in Warwick gaol," *none being then in prison*, the words would not be actionable, but otherwise *had a felon been there at the time.*

In Sir Harbert Crofts v. Brown†, the words were, "Sir H. C. keepeth men to rob me." And upon giving judgment for the defendant, Coke, C. J. said, "We will not give more favour unto actions on the case for words, than of necessity we ought to do, where the words are not apparently scandalous, these actions being now too frequent."

In the early part of the reign of queen Anne, Chief Justice Holt‡ observed, that "it was not worth while to be learned on the subject, but *when-*

* Bulst. 40.

† 3 Bulst. 167.

‡ Baker v. Pierce, Holt, k. 654. 6 Mod. 24. S. C.

ever any words tended to take away a man's reputation, he would encourage actions for them, because so doing would much contribute to the preservation of the peace." And in another report* of the same case, he is stated to have said, "I remember a story, told by Mr. Justice Twisden, of a man that had brought an action for scandalous words spoken of him; and upon a motion made in arrest of judgment, the judgment was arrested, and the plaintiff being in the court at the time, said, that if he had thought he should not have recovered, he would have cut the defendant's throat."

Yet the same learned judge, in a case† somewhat subsequent to the former, is reported to have said, that "to make words actionable in themselves, it is necessary *to charge some scandalous crime by them*." In the case of Ogden and Turner‡, the defendant said to the plaintiff, "thou art one of those that stole my Lord Shaftesbury's deer." The court held, "that words to be of themselves actionable, without regard to the person or foreign help, must *either endanger the party's life, or subject him to infamous punishment*, and that it is not sufficient that the party may be fined and imprisoned: for that, if any one be found guilty of any common trespass, he shall be fined and imprisoned, and yet, that no one will assert, that, to say one has committed a

* Lord Ray. 959.

† Walmesley v. Russel, 6 Mod. 200.

‡ 6 Mod. 104. 2. Salk. 696. Holt, 40.

trespass will bear an action, or that at least the thing charged upon the plaintiff must be *scandalous.*" And in the same case it was held, that where the penalty for an offence by a statute was of a pecuniary nature, an imputation of such an offence would not be actionable, even though in default of payment the statute should direct the offender to be set in the pillory, since the setting in the pillory was only for want of money, and not the direct penalty given by the statute.

In Button v. Heyward*, Fortescue Justice observed, "It was the rule of Holt, C. J. to make words actionable *whenever they sound to the disreputation of the person of whom they were spoken;* and this was also Hale's and Twisden's rule, and I think it a very good rule."

Such is the nature of the general rules upon which the older decisions were founded.

The ground of an action for words in the absence of specific damage, is, as has already been seen, the immediate tendency in the words themselves to produce damage to the person of whom they are spoken, in which case, presumption supplies the place of actual proof. The immediate and obvious inconveniences resulting from a charge of crime are, the party's degradation in society, and his exposure to criminal liability. In the former case the presumption is, that he has lost the benefit of inter-

* 8 Mod. 24.

course with society; in the latter, that he is placed in jeopardy, and that the suspicion excited by the report, may produce a temporary deprivation of his liberty until his innocence can be made manifest. Further than the evil of a temporary privation, the presumption cannot in general be carried, since a *mere false report* cannot *of itself* affect the party's life; and if the report be true, he is not, as will afterwards be seen, entitled to an action. Cases may however occur, where the detriment may be much more serious than a temporary loss of liberty. It is very possible to suppose, for instance, that an unfortunate combination of circumstances may leave the question of guilt or innocence, in a capital case, so nicely poised in the mind of the jury, that a prejudice instilled by a previous report, may turn the scale against the accused though really innocent; and this apprehension was still more formidable, when the law required a man's jury to be summoned from the *Neighbourhood*, a place likely to be the most strongly infected with the prejudice. The liberty of every individual, however, is considered by the law as so valuable, that the very probability of its suspension is held sufficient to enable him to assert his innocence in court, to avert the evil apprehended, and to recover damages for the injury at the very earliest opportunity.

Since then the grounds of action are to be found in one or both these consequences, namely, the de-

gradation of the party in society, or his liability to criminal animadversion, it becomes material to ascertain, by reference to the decided cases, under what restrictions one of both of these can constitute the subject matter of such an action. First, it is to be observed, that though these two consequences cannot be completely separated, inasmuch as a greater or less degree of discredit must necessarily attach to every violation of the existing law, yet that *the party's jeopardy in a legal point of view is considered by the law as the principal ground of action.* This appears from the general scope and tendency of the body of cases, to be found in the books, relating to this copious subject, in which, though the discredit to the party is frequently a topic of discussion, yet the main question, for the most part, turns upon the penal consequences of the offence, and the certainty wherewith it is charged.

There are, however, many instances to be found which prove, that criminal liability is not always the peculiar and exclusive ground of action, and in which a remedy has been given on account of imputations, which, if believed and even proved, could not have subjected the plaintiff to any future penalty:—For instance,

The defendant said, "Robert Carpenter* was in Winchester gaol, and tried for his life, and would have been hanged had it not been for Leggat, for breaking open the granary of farmer A. and stealing his bacon."

* Carpenter v. Tarrant, Rep. Temp. Hard. 339.

In* Gainford v. Tuke the words were—"Thou wast in Launceston gaol for coining!" The plaintiff replied, "If I was there, I answered it well." "Yea," said the defendant, "you were burnt in the hand for it!"

In Boston v. Tatham†. The action was brought for saying that the plaintiff was a thief, and had stolen the defendant's gold. It was contended in arrest of judgment, that the words not being certain as to time, they might be taken to refer to the time of Queen Elizabeth, since which there had been divers general pardons, in which case no loss could happen from the scandal. But the court said, that it is a great slander, to be once a thief; and that although a pardon may discharge of punishment, yet the scandal of the offence remains.

In the above cases of Carpenter v. Tarrant, and Gainford v. Tuke (the former of which was cited by Lord Ellenborough C. J. in giving judgment in a late case‡), the words import, that the plaintiff had been acquitted in the one case, and punished in the other; neither imputation, therefore, though believed, could have exposed either of the plaintiffs to future liability. In these and similar instances it is likewise to be observed, that though motions were made in arrest of judgment, the

* Cro. Jac. 536.

† Cro. J. 622. Vid. Sty. 49. All. 35. 1. Vin. Ab. 415. pl. 8.

‡ Roberts v. Cambden, 9 East. Rep.

objection relied upon was, that the words contained no direct charge of felony; and it was not insisted upon as essential to the action, that the words must impute an offence which may expose the party to a future prosecution, though there was room in each of these cases for making the objection, had it been thought available. And in the case of Boston v. Tatham, the court expressed an opinion, that, even allowing that the words fixed the offence to a period, since which the liability to punishment must have been discharged by a general pardon, yet that the words were actionable since the the scandal of the offence remained. And although in these cases the principal ground upon which words of this description are held actionable seems abandoned, yet the good sense of the decisions is obvious; for were it otherwise, the slanderer might always secure impunity by cautiously asserting that the party slandered had already suffered the punishment appertaining to the imputed offence.

Supposing it, however, to be perfectly true, that in some instances the presumption of prejudice to the plaintiff in society is a ground of action, independent of any detriment in a criminal point of view, yet it appears clearly established, that "*No charge upon the plaintiff, however foul, will entitle him to damages, unless it be of an offence punishable in a temporal court of criminal jurisdiction.*"

Thus, by a long series of cases it has been de-

cided, that to say a man is "forsworn*," or that he has taken a false oath, generally, and without reference to some judicial proceeding, is not actionable; and the reason is, that in the latter case a perjury is charged, for which, were the charge true, the party would be liable to be indicted and punished; in the other, a breach of morality is imputed, of which the law does not take cognizance.

So, to accuse another of having secreted† a will, for the purpose of defrauding his relations, is not actionable; though a person, who by such means possesses himself of the testator's property, would be regarded by society in no better light than the stealer of an horse, or the picker of a pocket. Again, where, in general, bad principles and vicious propensities are imputed to the plaintiff, he is not entitled to any compensation in damages without proof of a specific loss; though a person known to possess such principles and propensities is as likely to be despised and avoided in society as if he had actually reduced them into practice.

The defendant‡ said of the plaintiff, "He is a brabbler and a quarreller, for he gave his champion council to make a deed of gift of his goods to kill

* Mo. 965. Cro. Eliz. 429. Popham, 210. Ow. 62. Cro. Eliz. 788. Cro. Eliz. 609. Cro. E. 720. Cro. Eliz. 195. 1 Vin. Ab. 404. 1 Rol. Ab. 40. Com. Dig. tit. Action on the case for defamation, D, 7. 6 Mod. 200.

† 3 Salk. 327.

‡ Eaton v. Allen, 4 Rep. 16. Cro. Eliz. 684.

me, and then to fly out of the country; but God preserved me."

Sir E. Coke*, in his comment upon this case, says, "Upon great consideration and advisement, it was adjudged, that the words in the principal case were not actionable; for (he adds) *the purpose or intent of a man, without act, is not punishable by law.*" And this rule seems in all times to have been adhered to with more consistency than is generally observable in decisions relating to this branch of the law, though many cases have been deemed to fall within the rule, where the words plainly imported an act done.

Thus, in the very case of Eaton and Allen above cited, there was more than a mere intention to procure the commission of a murder; there was a solicitation to commit one, which is of itself an indictable offence.

In Lewknor† v. Cruchley. The words were, "He and another, knowing that J. S., a goldsmith, did carry with him a great deal of plate, did lie in wait to rob him, and set upon him by the high-way; but he raising the country, they did fly away, and Lewknor lost his horse, and they both were driven to ride away upon one horse." It was contended in arrest of judgment, that by the plaintiff's own shewing, no felony was charged upon him, but nothing more than a mere intent; but the court were of opinion, that the action well lay, for that not only

* 4 Co. 16. pl. 10. † Cro. Car. 140.

an *intent*, but a *fact* was charged, for which fine and imprisonment were due.

The cases are so uniform upon this point, that it would be superfluous to cite further instances to shew that, for an imputation of evil inclinations or principles, no action lies; unless, indeed, as will afterwards be considered, it affect the plaintiff in some particular character, or produce special damage.

And so general terms of abuse, expressive of evil inclinations and corrupt manners, as rogue*, rascal, scoundrel, and the like, are not actionable, since they do not impute any precise and definite offence punishable in the temporal courts. So it has been said, that the word *swindler* is too general to support an action, but Mr. J. Aston formerly held otherwise†.

In the case of Jones v. Herne‡, C. J. Willes said, that if it was now *res integra*, he should hold, that calling a man a rogue, or a woman a whore, in public company, was actionable.

It seems also to be clearly established, that words imputing an offence‖, *merely spiritual*, are not in themselves actionable; and the reason assigned for this is§, that the party slandered may, for such words, institute a suit in the spiritual court; and that if an action were to be entertained in a temporal court, the party would be twice punished for the same words. Whatever merit this reason may

* 3. Bl. C. 124. 1. Vin. Ab. 417. † 1 T. R. 753.
‡ 2 Wils. 87. ‖ 4. Co. 20. § Salk. 694. 12 Mod. 106.

possess, the rule itself seems fully established, that, where the defamation concerns matter merely spiritual, and determinable in the ecclesiastical court, as imputing adultery, fornication, or heresy, it is no ground of action at common law.

The power of the spiritual court is, however, confined to the infliction of penance *pro salute animæ*, and does not extend* to the awarding damages or amends to the injured party.

In the particular class of cases where acts or habits of incontinence have been imputed to females, doubt has been entertained, whether an action was maintainable: these, however, will be hereafter considered under a more appropriate division of the subject, since it seems both from actual decision and analogy, that such imputations cannot in general be considered actionable as charging a temporal crime†.

In Barnabas‡ v. Traunter. The plaintiff declared, that he was a parishioner of S., and that the defendant, being vicar there, with the intent to scandalize the plaintiff, and to draw an ill opinion of him among his neighbours, and to exclude him from the church, and to deprive him of all the benefit of hearing divine service in the said church; in the time of divine service, in the hearing of the parishioners, maliciously pronounced the plaintiff

* 4 Co. 20. † 1 Vin. Ab. 392. Cro. J. 323. 473. Poph. 36.
‡ 1 Vin. Ab. 396.

excommunicated, and further refused to celebrate divine service till the plaintiff departed out of the church; upon which the plaintiff was compelled to go out of the church: whereas the plaintiff was not excommunicated; by which means the plaintiff was scandalized and hindered of hearing divine service for a long time; and for the clearing of this scandal and shewing his innocency therein, was put to great trouble and expense. And the action was held maintainable, though the plaintiff did not shew that any man avoided his company, or forbore to trade or deal with him, or that he had any temporal or special loss; for it was said, this is a great and malicious scandal, though to his soul and though spiritual.

Though, scandal to the soul, was the reason assigned for allowing the plaintiff to recover in this instance, the case itself can scarcely be considered as an exception to the general rule; since, though a charge of excommunication supposes nothing more than a spiritual offence or contempt upon which it is grounded, an imputation of which offence would not be actionable, and although the deprivation of the spiritual benefits complained of cannot be considered as a temporal loss; yet, excommunication itself is attended with many serious temporal inconveniencies: the object of it is excluded from the society of all christians; is disabled to do any act that is required to be done by one that is *probus et legalis homo*; he cannot serve upon juries;

cannot be a witness in any court; and, which is still more serious, he cannot bring an action, real or personal, to recover lands or money due to him*. He is further liable to the writ† *de excommunicato capiendo*, by which the sheriff is directed to take the offender and imprison him in the county gaol, till he is reconciled to the church. On the ground of these temporal deprivations under which a person excommunicated labours, the above case may perhaps be considered as authority, consistently with the general rule.

The rule itself is liable to so little doubt that it would be losing time to cite cases in support of it, otherwise than by way of general reference‡,—one instance may suffice.

The defendant‖ said that the plaintiff "had two bastards, and should have kept them;" by reason of which, words and discord arose between the plaintiff and his wife, and they were likely to have been divorced. After verdict it was moved, in arrest of judgment, that these words were not actionable, because he doth not shew any temporal loss, as loss of marriage, or the like; but this imagination to be divorced is not to any purpose, and it is but a causeless fear; and of that opinion was all the court.

But where the words impute an offence for which, though of *spiritual cognizance*, the plaintiff is liable to *punishment in a temporal court*, they are actionable.

* Litt. 201. † Fitz. N. B. 62. ‡ 1 Vin. Ab. 392. ‖ Cr. J. 473.

So that to impute incontinency to a female in London is actionable, because by the custom of the city she is liable to be carted for her offence*.

So the calling a woman, living in the borough of Southwark, "whore," is actionable†, because she is liable to public carting by prescription.

So, to say that a man is the father of a bastard, is not actionable, unless it be alleged of a bastard likely to become chargeable to the parish, for otherwise he is not liable to the penalties of the statute‡ of Elizabeth.

So, to accuse another of fornication was held actionable, whilst the statute making it a temporal offence was in force‖.

Although the action itself is limited to cases where the offence charged is defined by law, yet, as has been shewn, the placing the party in jeopardy is not the exclusive ground of action. It may be asked then, since the loss in some cases consists solely in the prejudice to the plaintiff's character in society, without any regard to his being endangered in law, how happens it that the extent of the action is confined by the former of these circumstances, and is not co-extensive with the latter? The answer seems to be, that though the presumption of prejudice to the plaintiff's charac-

* 12 Mod. 106. Holt. R. 40. 1 Vin. Ab. 395.

† Keb. 418. Sid. 97. 1 Vin. Ab. 395.

‡ Salter v. Brown, 1 Vin. Ab. 397. Cro. Car. 436.

‖ 2 Sid. 21.

ter in society is frequently the most serious ground of complaint, yet, that such prejudice does not in itself furnish a rule sufficiently clear to determine the extent of the action. Whence it becomes necessary to adopt some other boundary, which though not exactly commensurate with the injury to be remedied, may, from the greater certainty and facility with which it can be applied, conduce in the main to the public good.

To say that a man is a bad father, husband, or son, that he is a drunkard or liar, or to charge him with want of veracity in a single instance, must, if the imputation be believed, induce a worse opinion to be entertained of him; and therefore be considered as a real detriment to an innocent party.—If then discredit alone were to be adopted as the criterion, the action would extend to every degree of discredit; a rule highly inexpedient, both on account of the endless litigation which it would produce, and of the other incident mischiefs which have been already touched upon; but if it be admitted, upon the principle of expediency, that some limitation be necessary, perhaps none could be adopted more convenient than the one recognized by the law, which confines the action to imputations of offences punishable in the temporal courts. The rule itself has the advantage of clearness and certainty in its operation, and is co-extensive with our criminal code; and it is to be remembered, that where imputations do not fall

within its scope, yet any specific damage accruing to the party in consequence of them, will entitle him to a remedy.

The action then is confined to cases where an offence is charged punishable in the temporal courts, it is next to be considered whether the action extends to *all, or to what portion of these.*

There may be some impropriety in supposing, that a violation of any existing law is not in some degree discreditable; for although the long catalogue of crimes, defined in our penal code, exhibits guilt in an almost infinite variety of shades; yet still the most trivial offender cannot in strictness be deemed wholly exempt from blame.

In many instances, however, the discredit attaching to the commission of the offence charged, is so minute, that it can scarcely be considered as the ground of action;

The defendant said, "thou hast harboured and received thy son into thy house, knowing before, that he was a seminary priest*." It was held, that the words were scandalous and actionable, the offence having been made felony by statute†. Yet it can hardly be presumed, that in this case the imputation could seriously injure the father's character in society, and consequently the remedy was given because the words endangered him in law.

Though much has been said upon the distinction

* Smith v. Flynt, Cr. J. 300. † 27 Eliz. c. 2.

between *mala prohibita* and *mala in se*, the solidity of the distinction has been denied by great authorities. As far as regards moral action, there seems to be little difference between these two species of evil. To take away the life or property of another, is termed *malum in se*, because the allowing such things is inconsistent with the public good: it is an evil, because it produces misery, and because this is self-evident, it is termed *malum in se*. Coining and larceny are both prohibited upon the same grounds, because each is inconsistent with the well-being of society: the only reason for terming the one *malum prohibitum*, and the other *malum in se*, is, that the latter is *evidently* detrimental and pernicious; the former is found to be so from experience; but the moral culpability in each case is in exact proportion to the mischief which the offence is known to occasion, and has no reference to the mode in which the extent of the mischief is ascertained.

It would, however, be refining too far to suppose, that men in general inquire very critically into the nature of moral guilt; and it must be owned, that it would be impossible to persuade the mass of mankind, that a man, whose parental feelings had urged him to supply his son with a place of refuge, was no better a member of the community than a highwayman or a house-breaker.

The books abound with cases which prove, that a charge of TREASON, or any species of FELONY, whether it existed at Common Law or was so con-

stituted by statute, has always been considered as actionable: to these may be added that of PERJURY, which in its very nature tends to destroy the plaintiff's credit in society; the courts have, however, gone beyond this, and imputations of many other misdemeanors have given rise to a numerous class of decisions.

In Stone v. Smalcombe*, the defendant having been arrested under a warrant made upon a latitat, said, "this is a counterfeit warrant, made by Mr. Stone (the plaintiff);" and though it was alleged for the defendant in arrest of judgment, that forging a warrant was not a forging within the statute of Elizabeth, the court held, that the words were actionable.

So in many cases the charging a mere solicitation or attempt to commit a felony has been held actionable. In Lady Cockaine's case†, the words were—"my Lady Cockaine did offer two shillings to a woman with child to get her a drink to kill her child, because it was gotten by J. S. Sir Thomas Cockaine's butler." And it was moved, that an action did not lie for the words; but it was adjudged for the plaintiff, for by them it was said, the lady's credit is impaired; and, if true, there was *cause to bind her to her good behaviour*, although it was not said, that she did give money, or that any hurt was done.

So in Tibbott v. Haynes‡, the defendant said,

* Cr. J. 648. † Cro. Eliz. 49. ‡ Ibid, 191.

"Tibbott, and one Gough, agreed to have hired a man to kill me, and that Gough should shew me to the hired man to kill me." Upon motion in arrest of judgment, J. Gawdy was of opinion, that the words were not actionable, because it was not alleged that any act was done by the plaintiff, nor any thing put in ure by him, but only a communication between him and Gough; and that it would have been otherwise had the defendant said, "he hired a man to kill me." But Wray and Fenner, justices, were of a different opinion, and judgment was given for the plaintiff. In Cardinal's* case, the words were, "if I had consented to Mr. Cardinal, J. H. had not been alive."—And the plaintiff had judgment. In the case of Eaton v. Allen† above cited, the words were, "he is a brabbler and a quarreller, for he gave his champion council to make a deed of gift of his goods to kill me, and then to fly out of the country, but God preserved me:" and though the former cases were cited, judgment was arrested, and the reason given in the report in Croke is, "that the first words, 'he is a brabbler, &c.' are not actionable; and that the latter words, commencing with '*for*,' did not contain any express affirmation." But Lord Coke observes, "that it was adjudged in this case upon great consideration and advisement, that the words were not actionable because the purpose and intent

* 4 Co. 16. † 4 Co. 16. Cro. Eliz. 684.

of a man without act is not punishable by law;" this reason is, however, defective, since the solicitation is in itself an act; and this case was overruled in the subsequent one of Lewknor v. Crutchley*.

The defendant there charged the plaintiff with having "set upon a goldsmith in the highway with intent to rob him." It was contended in arrest of judgment, that no felony was charged, but a mere misdemeanor; and the case of Eaton v. Allen was cited; but the court delivered their opinions *seriatim*, that the action lay, and said, "that although the defendant charged him with an act that is not felony, yet he chargeth him not only with the intention, but with a fact, which is as near to felony as may be, and with such an offence as is more than intent only, and more than riot, and for which fine and imprisonment are due." And Jones, J. cited Wicks's case, where the defendant said, "nine persons set upon me to have robbed me, and you (Wicks) was one of them;" and it was adjudged that the action lay.

If any distinction can be made between the two last cases†, it consists in this; that in the former there was a solicitation only, to commit felony; in the latter there was an overt act exercised in pursuance of a felonious intention. Such a distinction is at all events now no longer available, since it is

* Cro. Car. 140.

† I. e. Eaton v. Allen, and Lewknor v. Crutchley.

clear that a solicitation to commit felony constitutes a misdemeanor*.

So where the charge is of a misdemeanor not at all connected with felony.

During an election of members† to serve in parliament, the defendant, holding up money in his hand, said of the plaintiff, who was a candidate, "these guineas are Mr. Bendish's (the plaintiff's) money, and were given me to vote for him; he has bought my vote, and he shall have it." It was contended, in arrest of judgment, that no words are actionable unless they subject the plaintiff to a temporal punishment, and that nothing had been said that could subject the plaintiff to an indictment on the statute; but Holt, C. J. was clearly of opinion, that the action lay, and judgment was given for the plaintiff. It is to be remarked, that bribery was an offence at Common Law‡, and punishable by indictment or information.

Where a commission had been awarded‖ out of chancery, to the plaintiff and three others, with the assent of the parties to a suit, to examine witnesses, and to hear and determine, the defendant, who was one of the parties (said of the plaintiff), "Sir George Moor, is a corrupt man, and hath taken bribes of Richard King (the other party to the suit):" And likewise further said, "Richard King hath set Sir

* 2 East, 6.

† Bendish v. Lindsay, 11 Mod. 194.

‡ Burr. 1335. 1359.

‖ Sir Geo. Moor v. Foster, Cr. J. 65.

George Moor on horseback, with his bribes, to pervert justice and equity." Upon motion in arrest of judgment, the court said, "that the plaintiff having the King's commission to execute, if he take bribes to execute it, it is a breach of the trust reposed in him, and is so great an offence, that he may be indicted and fined at the Common Law;" and the plaintiff had judgment.

To charge a person with having given a sum of money to the commissioners to be made purser of a man of war, was held actionable; such an offence being a corruption of a public trust, and a crime both in the commissioners and the person tempting them, and the words therefore actionable, as imputing a criminal charge*.

In the case of Sir William Russel v. Ligon†, it was adjudged and agreed, that an action lies for charging the plaintiff with being the author of a libel, though the making a libel is not an offence which concerns life or member, but punishable only by fine and by imprisonment in the Star Chamber, or upon an indictment at Common Law. In the principal case, it seems, however, to have been averred in the declaration, that the plaintiff was a Justice of the peace.

So to say, a person keeps a bawdy house, is actionable, because the offence is indictable; and though it has been held, that such words are not

* Purdy v. Stacey, Burr. 2698.

† 1 Vin. Ab. 423. pl. 27. 1 Com. Dig. tit. Action on the case for defamation, 8, 9. 1 Roll. Ab. 46.

actionable, the reason on which the judgment was given is bad, since it was assumed*, that the offence was not indictable at Common Law.

So, to accuse a person of subornation of perjury†.

So the charging another with receiving goods, knowing them to be stolen, was actionable, whilst the offence remained a mere misdemeanor, and punishable by fine and imprisonment at Common Law.

For though it was held in the case of Dawes‡ v. Bolton, that for the words "Thou art a knave, and hast received stolen swine; and hast received a stolen cow, and thou knowest they were stolen!" Yet the ground of decision was, that the words were to be considered in *mitiori sensu;* and that it might be, that the defendant meant that the plaintiff had received them as bailiff or lord of a manor, who had liberty to have waif's and felon's goods; and it seems to have been allowed, that, had a guilty knowledge been intended, the words would have been actionable. In Cox‖ v. Humphreys, the defendant said, "Thy boy (the plaintiff's son) hath cut my purse, and thou hast received it, knowing it; and hast the rings and money that were there in thy hand!" And it was held,

* Cro. Eliz. 643. sed vid. 1 Roll. 44. 1 Buls. 138.

† Cro. J. 158.

‡ Cro. Eliz. 888.

‖ Cro. Eliz. 889.

that the words were not actionable, because it did not appear *that a felonious taking* was meant.

And it seems that to charge a brewer with selling unwholesome beer is actionable, since the selling such beer is *an indictable offence**.

In Sir Lionel Walden† v. Mitchell, the defendant said, that the plaintiff went to mass, and the words were held actionable; since by the statute 27 Eliz. c. 4. the offender was liable to forfeit £100, and to be imprisoned for a year.

So, whilst the statutes against witchcraft were in force, it was held, that to say "thou art a witch and a sorcerer," was actionable‡: And Gawdy J. said, "If he bewitches men so as they die, it is felony: if he uses witchcraft in any other way, he shall stand in the pillory; so that it is a slander in every respect, and a good cause of action."

In Mayne v. Digle||, it is laid down, that *an action lies for any words which import the charge of a crime for which a person may be indicted.*

From these instances cited, and a number of similar ones to be met with in the reporters, it seems difficult to find any other limit for the extent of the action than that laid down in the last case; and though there are *dicta* and decisions to the contrary, both may, perhaps, be considered as borne down by the current of the authorities cited, and

* 1 Vin. Ab. 477. Free. 25. 6 Bac. Ab. 210.

† 2 Vent. 265.

‡ Cro. Eliz. 571. Rogers v. Gravat.

|| Free. 46.

others, in which words have been considered actionable, as charging an indictable offence.

Thus it has been held, that no action lies for publishing of the plaintiff, that he is a *regrator**; and the reason given is, because the offence of regrating, is not punishable by loss of life or limb; but this decision cannot be considered as law, since it is contradictory to all the cases last cited.

So it has been held, that for the words "Thou art a common barretor†, and I will indict thee for it at the next assizes," no action lies.

But for the words, "Thou maintainest such a suit," it was said by Popham C. J.‡, that an action had been held maintainable upon good deliberation, in the case of Sir H. Portman v. Stowell; maintenance being unlawful and odious.

In Ogden‖ v. Turner, as already observed, it was expressly held by Holt C. J. that to render words actionable it is not sufficient that the party may be fined and imprisoned for the offence. For that if any one be found guilty of a common trespass, he shall be fined and imprisoned; yet that no none would assert, that to say one has committed a trespass, will bear an action. This dictum, however, was materially contradicted by what fell from Ld. C. J. De Grey, in giving judgment in the

* Scoble v. Lee, 2 Show. 32.

† Cro. Eliz. 171. Yel. 90.

‡ 1 Vin. Ab. 424. pl. 34. Mo. 428.

‖ Salk. 696. Holt. 40.

case of Onslow* v. Horne. In that case he observed, "As far as I can collect, for determinations in actions for words, there seem to be two general rules whereby courts of justice have governed themselves, in order to determine words spoken of another to be actionable. The first rule is, that the words must contain an express imputation of some crime liable to punishment—some capital offence or other infamous crime or misdemeanor; and the charge upon the person spoken of must be precise. In the case of Ogden and Turner, the words are, 'Thou art one of those that stole my Lord Shaftesbury's deer!' and were not held actionable; for though imprisonment be the punishment in those cases, yet per Holt C. J. "*It is not a scandalous punishment; a man may be fined and imprisoned in trespass; for*, says he, *there must not only be imprisonment but an infamous punishment.* I think Lord Holt carries it too far, as to precision; for it is laid down in Finch's Law†, "If a man maliciously utters any *false slander*, to the endangering one in law, as to say, 'He hath reported that money is fallen,' for he shall be punished for such report." Here is the case of a crime, and the punishment not infamous; and yet Finch seems to say, that an action lies for these words."

In Holt v. Scholefield‡, Mr. J. Lawrence observed, with regard to the case in Bulstrode‖; "I

* 2 Wils. 177. † 185. ‡ 6 T. R. 691. ‖ 1 Buls. 40.

think Mr. Justice Williams goes too far in saying, that words that tend to the infamy, discredit, or disgrace, of the party, are actionable.

The most correct rule is laid down in Onslow v. Horne. The words must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanour. There is also a case in Siderfin*, which is in direct contradiction to the case in Bulstrode."

In many of the cases where charges of crime have been held actionable, it is observable that stress has been laid upon the terms *scandalous* and *infamous*, used as descriptive either of the crime charged or the punishment appertaining to it. Although this affords some reason to infer, that the actionable quality does not extend to all charges of misdemeanour for which fine and imprisonment may be inflicted, yet a distinction of this nature seems unwarranted by the cases, and would afford a very dubious rule, the terms scandalous and infamous being of themselves words of very indefinite import. It would be a very difficult task to ascertain the precise point in the scale of offences where infamy and scandal cease to attach, and misdemeanour assumes a more respectable character.

From these authorities, perhaps, it may be inferred generally, that, TO IMPUTE ANY CRIME OR MISDEMEANOUR FOR WHICH CORPORAL PUNISH-

* 1 Sid. 48.

MENT MAY BE INFLICTED IN A TEMPORAL COURT, IS ACTIONABLE WITHOUT PROOF OF SPECIAL DAMAGE.

Where the penalty for an offence is merely pecuniary, it does not appear that an action will lie for charging it; even though in default of payment, imprisonment should be prescribed by the statute, since imprisonment is not the primary and immediate punishment for the offence*.

Any objection as to the extent of the above rule, is in a great measure obviated by the statute of James I. which, where the damages given do not amount to forty shillings, limits the costs to the amount of the damages: this wholesome provision was found of great use in confining this species of litigation, (which had before increased to a prodigious extent,) within narrower and more convenient boundaries.

The rule seems also founded in strong reason. The privilege of censure, to a certain extent, operates as a beneficial and necessary restraint upon conduct; but the advantage ceases where the law can interfere and visit wrong-doers with prescribed punishments: there the office of the private censurer seems to terminate, superseded as he is by a more competent authority, armed with appropriate powers for the protection of the community.

2dly. In what manner must the offence be imputed?

* 5 Mod. 194.

Where the imputation contains a *direct charge* of crime in precise terms, little difficulty can occur in the application of the foregoing rule. In most instances, however, an unpremeditated use of words of doubtful meaning, or an intentional selection of them, for the purpose of impunity, have occasioned much perplexity and litigation. In a great proportion of cases, the question has been, not whether a charge of a specific offence is actionable? but whether, in fact, any offence has been charged by the words? The rule of law requires, that, to ground an action, "words imputing crime must be precise;" but it is by no means essential, that they shall carry on the face of them an open and direct imputation. Such a rule, it is clear, would afford no security against calumny, which may be as effectually conveyed in artful allusions to collateral matter, and oblique insinuations, as by assertions the most explicit.

It is, however, incumbent upon the party who complains that he has suffered from an imputation of crime, to shew with certainty, the injurious nature of the communication.

In order to establish this point two circumstances are necessary:—

1st. That the words or signs used should either of themselves, or by reference to circumstances, be capable of the offensive meaning attributed to them.

2dly. That the defendant did, in fact, use them in that sense.

The capability of the words or signs to bear a particular construction, must, it is evident, appear upon the plaintiff's statement of his case; for otherwise it would not judicially appear that he was entitled to recover. That the defendant did, in fact, use them in that sense, is a matter of evidence to be decided upon the trial, which will be a subject for future consideration. It may, however, be necessary to observe here, that if it appear from the words or signs themselves, or from circumstances, that they are capable of conveying the particular meaning attributed to them by the plaintiff, it will, after verdict for the plaintiff, be taken for granted, that the words and signs were, in fact, used to convey such meaning; for that is a matter upon which the jury alone can decide, and which they must be convinced of before they can give their verdict for the plaintiff.

Any objection, therefore, to the words or signs as stated upon the record, is grounded upon the supposition that it does not sufficiently appear, that they are CAPABLE of an actionable meaning.

It will be proper, therefore, next to consider the different kinds of ambiguities which may arise, not only in the particular case where crime has been charged and where doubt most frequently occurs, but with relation to cases of slander and libel in general, which are governed by the same rules of construction.

Words or signs may be divided into three classes:—

1st. Those which bear an obvious and precise meaning on the face of them; as if A. said to B., "You murdered C."

2dly. Those which on the face of them are of dubious import, and are capable either of a criminal or innocent meaning; as if A. say to B., "You were the death of C."

3dly. Those which are *prima facie* and abstractedly innocent, and which derive their offensive quality from some collateral or extrinsic circumstance; as if A. say to B. "You did not murder C.!" which words, from the ironical manner of speaking them, may convey to the hearers as unequivocal a charge of murder as the most direct imputation.

With respect to ambiguities arising out of the second and third classes, it is now the settled rule of law, that, *both judges and juries shall understand words in that sense which the author intended to convey to the minds of the hearers, as evidenced by the whole circumstances of the case. That it is the province of the jury, where such doubts arise, to decide, whether the words were used maliciously and with a view to defame, such being matter of fact to be collected from all concomitant circumstances; and for the court to determine, whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action.*

It was long, however, before this rule, rational as it is, and supported by every legal analogy, prevailed in actions for words; and before the favourite doctrine of construing words in their *mildest sense*, in direct opposition to the finding of the jury, was finally abandoned by the courts.

A very few specimens of cases where the doctrine of the *benignior sensus* was allowed to prevail, may be deemed sufficient. "Thou art as arrant a thief as any in England; for thou hast broken up J. S.'s chest, and taken away 40*l.*" After verdict for the plaintiff, the court, on motion in arrest of judgment, held, that the action lay not: for, he sheweth not that he stole any money, or robbed him of any money; for an action is not to be maintained by intendment, but by express words, and the words do not prove any felony committed; for the money may be taken away, and the chest broken open in the mid-day*, and in the presence of divers; and therefore it is not any felony.

The defendant said†, "Thou art a lewd fellow; thou didst set upon me by the highway, and take my purse from me, and I will be sworn to it!" After judgment for the plaintiff, error was assigned, because the words did not charge the plaintiff with felony, nor with any felonious taking away; and it may be, he took away the purse in jest, or for

* Foster v. Browning, Cro. J. 687.

† Holland v. Stoner, Cro. J. 315.

some other cause; and of that opinion were all the Judges and Barons. The defendant* said, "Thou art a thievish rogue, and hast stolen bars of iron out of other men's windows!" It was held, that the action lay not; for the bars of iron are parcel of the freehold, and the stealing of them is not any felony; and it shall not be intended of bars lying in windows, as was objected that it might be; for it shall be taken in the best sense for the defendant. And it was said, that it was adjudged in one Bridge's case, that for saying, "thou art a thief, and hast stolen my corn in the field," no action lies; for it shall be intended standing corn, which is not felony; wherefore it was adjudged for the defendant.

In King† v. Bagg. In error. The action was for the words, "Mr. J. D. was robbed of 40*l.*, and 100 marks' worth of plate, and Alice Bagg (the plaintiff) and J. S. had it, and for which they will be hanged!" And after verdict and judgment for the plaintiff, it was assigned for error, that an action lies not for these words; for he doth not say that she stole it, and it may be that they came to it by lawful means; and although he saith that they will be hanged for it, these words by themselves will not maintain an action, and they do not enforce the first words; wherefore the judgment was reversed.

"Thou‡ dost lead a life in manner of a rogue, I

* Cro. J. 204. † Cro. J. 331. ‡ Ib. 331. Jenk. 302.

doubt not but to see thee hanged for striking Mr. Sydman's man who was murdered!" And it was held that the words were not actionable, for they are not positive for the murder of Mr. Sydman's servant; he might be beaten by the plaintiff, and murdered by another. Actions of slander do not lie upon inference.

It seems unnecessary to adduce more instances of the prevalence of this rule of construction; the following may be adduced in support of the doctrine which now prevails.

In Ceely* v. Hoskins, in error. The words were, "Thou art forsworn in a court of record, and that I will prove!" It was contended, after verdict for the plaintiff, that the action would not lie, because he did not say in what court of record he was forsworn, nor that he was forsworn in giving any evidence to the jury; that it might be intended only that he was forsworn, not judicially, but in ordinary discourse in some court of record: But (per Croke) "Jones, Berkeley, and myself, held clearly that the action well lay, and that such foreign intendment as Maynard (for the defendant) pretended, shall not be conceived, and it shall be taken that he spake these words maliciously, accusing him of perjury; and for a false oath taken judicially, upon judicial proceedings in a court of record; and shall be taken according to the common speech and usual intend-

* Cro. Car. 509.

ment: as to say, such a one is a murtherer, without saying whom he murdered, or when, an action lies; and it shall not be intended that he was a murtherer of hares, unless such foreign intendment be shewn or discovered in pleading."

In Baal* v. Baggerley. The words were, "Thou hast forged a privy seal, and a commission! Why dost thou not break open thy commission?" And after verdict for the plaintiff, it was contended for the defendant, that the words were not actionable; for it did not say the king's privy seal, nor any writ under the privy seal; also he said not what commission; and the words subsequent "thy commission," shewed that he meant a commission made by the plaintiff himself: but the judges, having taken time to consider (Berkeley doubting) afterwards, delivered their opinions—"That the action well lies; for the words be spoken maliciously; and being alleged in the declaration, that he spake them to scandalize him, for forging of the privy seal and commission; and being found guilty, it shall be intended according to the vulgar interpretation, to mean the king's privy seal, the counterfeiting whereof is treason; and a commission shall be intended the king's commission, under the privy seal;" and Berkeley agreed with the others.

In Somers† v. House. The words were, "You

* Cro. Car. 326. † Holt, 39.

are a rogue, and broke open a house at Oxford; and your grandfather was forced to being over 30*l.* to make up the breach!" And after verdict for the plaintiff, it was moved, in arrest of judgment; because, *rogue*, is not actionable; and *breaking open the house*, but a trespass; and *making up the breach*, might be repairing; but the court seemed contrary: for, upon all the words together, a man who heard them could not intend other than a felonious breaking of the house; and though in *the old books the rule was, to take the words in mitiori sensu*, yet per Holt, *they would take the words in a common sense, according to the vulgar intendment of the bystanders.*

In Baker* v. Peirce. The words were, "Baker stole my box-wood, and I will prove it!" After verdict for the plaintiff, Serjeant Darnell moved, in arrest of judgment, that these words are not actionable; for they shall be taken to mean wood growing, or the like, whereof only a trespass can be committed. That to say, you are a thief, and have stolen my timber or my apples, or my hops, is not actionable: for where words import either a felony or a trespass, they shall be taken in the mildest sense, unless there be other words to determine them in the worse sense: as to say, he stole my timber out of my yard, or my hops in a bag; and cited Mason† v. Thompson—"I charge thee with fe-

* Lord Ray. 959. 6 Mod. 234. Holt, 654. † Hutt. 38.

lony for taking forth from J. D.'s pocket, and I will prove it!" The words were held not to be actionable, because it should not be intended to mean a felony, not being directly affirmed. But Holt C. J. and the court denied that case to be law, for the taking out of a man's pocket must be intended a felonious taking.

For the plaintiff it was contended, that the words, according to common parlance, imported a thing of which felony might be committed.

And afterwards the court gave judgment for the plaintiff; Powell J. observing, "The case cited by my brother Darnell, is so, but the later books are contrary; and I will stick to the later authorities, being grounded on so much reason."

In the case of Burges* v. Boucher. The court observed, "There are several cases wherein it has been adjudged, that where words may be taken in a double sense, the court, after a verdict, *will always construe them in that sense which may support the verdict.*"

The plaintiff brought his action for the words, "He† is a clipper and a coiner!" After a verdict for the plaintiff, it was moved, in arrest of judgment, that the words did not charge the plaintiff with clipping or coining money; for they may be applied

* 8 Mod. 240.

† 3 Salk. 325. 2 Vent. 172. 2 Lev. 51. 2 Sir T. Jo. 235.

to many other things; but judged actionable, for it must be intended that he meant the clipping of money, and in that sense it is usually understood.

In Harrison* v. Thornborough. The court observed, that, "Precedents in actions for words are not of equal authority as in other actions, because, *norma loquendi* is the rule for the interpretation of words, and this rule is different in one age from what it is in another. The words which an hundred years ago did not import a slanderous sense, now may, and *vice versâ*. In this kind of actions for words, which are not of very great antiquity, the courts did at first, as much as they could, discountenance them, and that for a wise reason; because generally brought for contention and vexation, and therefore, where the words were capable of two constructions, the court always took them *mitiori sensu*. But, latterly, these actions have been more countenanced; for men's tongues growing more virulent, and irreparable damage arising from words, it has been, by experience, found, that unless men can get satisfaction by law, they will be apt to take it themselves. The rule, therefore, that has now prevailed, is, *that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them.*"

In Button† v. Hayward and his wife. The words

* 10 Mod. 196. † 8 Mod. 24.

spoken by the wife were, "George Button (the plaintiff) is the man who killed my husband!" her first husband being dead. After verdict for the plaintiff, it was moved in arrest of judgment, that these words are not actionable for the uncertainty of the word *killing*, for it might be justifiable, or in his own defence, or *per infortunium*, and shall not be presumed felonious, and so made actionable by intendment: for it is a maxim, that words shall be taken in *mitiori sensu*. But it was said by Pratt C. J. "There can be no question but at this day these words are actionable. In former times, words were construed in *mitiori sensu*, to avoid vexatious actions, which were then too frequent; but now, *distinguenda sunt tempora:* and we ought to expound words according to their general signification, to prevent scandals, which are at present too frequent. *We are to understand words in the same sense as the hearers understood them; but when words stand indifferent, and are equally liable to two distinct interpretations, we ought to construe them in mitiori sensu; but we will never make any exposition against the plain natural import of the words.*" "The word *killing* signifies a voluntary and unlawful killing, and is actionable. There are a great number of odd cases in the books;" And by Eyre J. "the words are to be taken in *their worse sense*, for a malicious and felonious killing." And by Fortescue J. "The maxim for expounding words in *mi-*

tiori sensu, has for a great while been exploded, near 50 or 60 years."

It was observed by Lord Mansfield in the King* v. Horne, "It is the duty of the jury to construe plain words and clear allusions, to matters of universal notoriety, according to their obvious meaning, and as every body else who reads must understand them: but the defendant may give evidence to shew they were used on the occasion in question in a different or qualified sense. If no such evidence is given, the natural interpretation of the words, and the obvious meaning to every man's understanding, must prevail.

"If courts of justice were bound by law to study for any one possible or supposable case, or sense, in which the words used *might be innocent*, such a singularity of understanding might screen an offender from punishment, but it could not recal the words, or remedy the injury. It would be strange to say, and more so to give out as the law of the land, that a man may be allowed to defame in one sense, and defend himself in another; such a doctrine would indeed be pregnant with the *nimia subtilitas* which my Lord Coke so justly reprobates."

In the case of Peake† and Oldham, Lord Mansfield said, "After verdict, shall the court be guessing and inventing a mode in which it might be

* 1 Cowp. 672. † Cowp. 277.

barely possible for these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not! Where it is clear that words are defectively laid, a verdict will not cure them; but where, from their general import, they appear to have been spoken with a view to defame the party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them. I am furnished with a case, founded in strong sense and reason, in support of this opinion. The name of it is Ward v. Reynolds, Pasch. 12 Ann. B. R. and it is as follows:—The defendant said to the plaintiff, 'I know you very well! How did your husband die?' The plaintiff answered, 'As you may, if it please God!' The defendant replied, 'No; he died of a wound you gave him!' On not guilty, there was a verdict for the plaintiff; and on a motion in arrest of judgment, the court held the words were actionable, because, from the whole frame of them, they were spoken by way of imputation; and Lord C. J. Parker said, 'It is very odd, that after a verdict, a court of justice should be trying whether there may not be a possible case in which words spoken by way of scandal might not be innocently said; whereas, if that were in truth the case, the defendant might have demurred, or the verdict would have been otherwise.' So here, if shewn to be innocently spoken, the jury might have

found a verdict for the defendant; but they have put a contrary construction upon the words as laid, and have found that the defendant meant a charge of murder."

In the King* v. Watson and others. Mr. Justice Buller observed, "Upon occasions of this sort, I have never adopted any other rule than that frequently stated by Lord Mansfield to juries, desiring them to read the paper stated to be a libel, as men of common understanding, and say, whether, in their minds, it conveys the sense imputed."

In Woolnoth† v. Meadows., it was observed by Le Blanc J. "That (after a verdict for the plaintiff) it is not sufficient to shew, by argument, that the words will admit some other meaning; but the court must understand them as all mankind would understand them: and we cannot understand them differently in court from what they would do out of court.

In Roberts‡ v. Cambden, which was an action for words alleged by the plaintiff to contain an imputation of perjury. After a verdict for the plaintiff, on a motion in arrest of judgment, on the ground that the words did not impute the crime with sufficient certainty, Lord Ellenborough C. J. in delivering judgment, observed, "The question simply is—Whether the words amount to such a charge? that is, whether they are calculated to convey to

* 2 T. R. 206. † 5 East, 463. ‡ 9 East, 96.

the mind of an ordinary hearer an imputation on the plaintiff of the crime of perjury. The rule which at one time prevailed, that the words are to be understood in *mitiori sensu*, has been long ago superseded; and words are now construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them." And in concluding, the same learned Judge observed, that, "without adverting to the long bead-roll of conflicting cases which have been cited on both sides in the course of this argument, it is sufficient to say, that these words, fairly and naturally construed, appear to us to have been meant, and to be calculated to convey the imputation of perjury actually committed by the person of whom they are spoken; and that, therefore, the rule for arresting the judgment must be discharged."

From these cases, containing the opinions of some of the most enlightened Judges of their own or any times, it may be collected—

1st. That where words are capable of *two constructions*, in what sense they were meant is a matter of fact to be *decided by the jury*.

2dly. That they are to be guided in forming their opinion by the impression which the words or signs used were calculated to make on the minds of those who heard or saw them, as collected from the whole of the circumstances.

3dly. That such words or signs will, after a ver-

dict for the plaintiff, be considered by the courts as having been used in their worst sense.

With respect to words, which on the face of them are harmless, and which derive their offensive meaning wholly from extrinsic circumstances, the preceding observations are applicable: the use of such words and signs as do in effect injure the reputation of an individual, are as much within the mischief as the most open charges: The grievance is, the loss of character; and by what means the wrong is effected is perfectly immaterial, either as to the suffering of the party, or the policy of the law providing him a remedy.

The* defendant wrote a pamphlet, called "Advice to the Lord Keeper, by a Country Parson;" wherein he would have him love the church as well as the Bishop of Salisbury—manage as well as Lord Haversham—be brave as another Lord; and so gave every lord a character, ironically; and so it was set forth in the information, and the jury found him guilty. Upon motion in arrest of judgment, it was shewn for cause, to arrest judgment, that there was no cause to charge the defendant, because he said no ill thing of any person; and all he said was good of them. But to this it was answered, and resolved by the court, that this was laid to be *ironical; and whether it was so or not, the jury were judges:* they found it so. And that if this were not a crime,

* Holt. R. 425.

the defendant might, by contraries, libel any person.

Having thus inquired what the general rules of construction are, as adopted by the courts, their application to the class of cases where crime is imputed, and the degree of certainty and particularity requisite to render such charges actionable, will next be considered.

The charge, to be actionable, must in general, as already stated, impute to the *plaintiff* an *act* of a *criminal nature*.

There are, however, some exceptions to this rule; as where treason is imputed; one species of which offence consists in *the compassing and imagining the death of the king*; which words signify nothing more than the purposed design of the mind, and not the carrying such design into effect*.

In the case of Sir John Sydenham† v. Man, the words were, "If Sir J. S. might have his will, he would kill the king!" and they were held actionable, although they referred to the will only; since it is a great offence to have such a will.

So where the party is charged with misprision‡ of felony; as where the defendant said, "He‖ knew of the murder of L. and did not reveal it till long after it came to his knowledge."

In other cases it must appear,

I. That some ACT was imputed by the defendant.

* 1 Haw. pl. C. 86. † Cro. J. 407. ‡ Vid. st. West. 1. 3 Ed. 1. c. 9. ‖ Yel. 154. 1 Vin. Ab. 446.

II. That such act is of a CRIMINAL NATURE.

III. That it was meant to be imputed to the PLAINTIFF.

I. That some ACT was imputed by the defendant.

The imputation of an act may be inferred,

1st. Although the terms of the communication be indirect.

2dly. Although the act imputed be, in legal strictness, impossible.

1st. Where the terms of the communication are indirect, it may be laid down as a general rule, that, wherever words are used, calculated to impress upon the minds of the hearers a suspicion of the plaintiff's having committed a criminal act, such an inference may and ought to be drawn, whatever form of expression may have been adopted. And although such forms of expression may be reduced under general heads, and examples cited under each to illustrate this rule, yet, contradictory and inconsistent as many of the cases are, a reference to them cannot be considered as of essential importance; the rule itself being so well established, that no case in contradiction to it can now be considered as a precedent.

It may, however, be deemed proper to select a few instances of cases falling under each division.

Where the terms of the communication are indirect, the imputation of an act committed may be inferred. Where the defendant expresses a *suspicion* or *opinion*, or *institutes a comparison*, or delivers

the words as matter of *hearsay*, or by way of *interrogation* or *answer*, or *exclamation*, or uses *disjunctive* or *adjective* words, or speaks *ironically;* or, in general, where the statement virtually includes or assumes the commission of the principal act, or a strong suspicion of it.

From words of *suspicion* or *opinion*. Yeoman* said of Hext, "For my ground in Allerton, Hext seeks my life; and if I could find John Silver, I do not doubt but within two days to arrest Hext for suspicion of felony." It was adjudged, that for the first part of the words, "for my ground in Allerton, Hext seeks my life," no action lay, for two reasons;—1st. because he may seek his life lawfully and upon just cause, and his land may be held of him. 2dly. Seeking of his life is too general; and for seeking only no punishment is inflicted by law.—But for the latter words, it was adjudged, that the action lay; because for suspicion of felony he shall be imprisoned, and his life drawn in question.

The defendant hearing that his father's barns were burnt, said,† "I cannot imagine who should do it but the Lord Sturton," and the words were held actionable.

An action lies for publishing of the plaintiff, "I‡ think, or I dreamed, he committed a certain

* 4 Co. 15. Poph. 210. Latch. 176. 3 Buls. 262.

† Mo. 142. 1 Vin. Ab. 435. pl. 13.

‡ Smith v. Wisdome, Cro. Eliz. 348. 6 Bac. Ab. 227.

felony;" for although the words are not directly affirmative, the plaintiff may, by reason of them be arrested upon suspicion of having committed that felony.

The defendant said, "He* is infected of the robbery and murder lately committed, and doth smell of the murder;" and the plaintiff had judgment, after long deliberation and argument; and this decision was cited and approved of in a number of subsequent cases†.

So for the words, "I‡ am thoroughly convinced that you are guilty," &c. for "I am thoroughly convinced," is equal to a positive averment: a man only avers a thing because he is convinced of the truth of it.

So for the words, "If|| thou hadst thy rights, thou hadst been hanged for such a felony," an action lies.

From words of *comparison*. The defendant said, "You§ are as great a rogue as J. S., who stole quilts!"

So for saying, "Thou¶ art as arrant a thief as any in England," an action lies.

So for the words, "As** sure as God governs the world, and King James this kingdom, J. N. hath committed treason."

* 1 Vin. Ab. 435.
† 3 Bulst. 249. God. 90. Hutt. 58. Cart. 214.
‡ Peake v. Oldham, Cowp. 275.
|| Brownl. 3.
§ Upton v. Pinfold, Com. 267.
¶ Cro. J. 687.
** Sid. 53.

From words of *hearsay*. As where the defendant said, "A* woman told me that she heard one say, that Meggs, his wife, had poisoned Griffin, her first husband, in a mess of milk." And in case of words so spoken, it seems immaterial whether the speaker really heard the words or not; unless†, as will afterwards be seen, at the time of repeating them he afford the plaintiff a cause of action against the original author.

From words of *interrogation*‡. As where the defendant said, "When|| wilt thou bring home the nine sheep thou stolest from J. N.?"

So an action lies for saying, "Did§ you hear that J. S. is guilty of treason?"

A.¶ the wife of B. was asked by C. "Wherefore will your husband hang J. S.?" She answered, "For breaking our house in the night, and stealing our goods." The words were held actionable, since, notwithstanding they were spoken in answer to a question, they amount to a charge of stealing goods.

The defendant published the following advertise-

* Golds. 139. Mo. 406. Cro. E. 645.

† Woolnoth v. Meadows, 5 East, 463. Cro. J. 162. 406.

‡ For words of interrogation in general, see Mo. 418. pl. 573. 2 Rol. Rep. 165. Palm. 66. 12 Rep. 134. Cro. J. 422. Keb. 359. pl. 52.

|| Hunt v. Thimblethorpe, Mo. 418. 1 Vin. Ab. 429.

§ Earl of Northampton's case, 12 Rep. 134.

¶ Hayward v. Naylor, 1 Rol. Abr. 50.

ment:—"This* is to request, that if any printer or other person can ascertain that James Delany, Esquire (the plaintiff), some years since residing at Cork, late Lieutenant in the North Lincoln Militia, was married previous to nine o'clock in the morning of the 10th of August 1799, they will give notice, &c., and receive the reward." And it was left by Lord Ellenborough C. J. to the jury to say, whether the advertisement imputed a charge of bigamy to the plaintiff.

So where the words are spoken by way of *exclamation:* as, "That† perjured villain!"

From *disjunctive words.* It has been said that, where two charges are made disjunctively, one of which is actionable and the other not, no action lies: as where the defendant said, "Thou‡ hast stolen my mare, OR didst consent to the stealing of her." It was held, that the action was not maintainable, on account of the latter words. And so where a charge was imputed in the alternative; as where the defendant said, "Sparkham did steal a mare, *or else* Godwin is forsworn!" Although it was averred that Godwin never did swear any such matter, the charge was held too indirect to bear an action.

In the case of Stirley‖ v. Hill, the words were,

* Delany v. Jones, 4 Esp. R. 191.

† Roll. Ab. 76.

‡ Cro. Eliz. 780.

‖ Cro. Car. 283.

"Thy brother was whipped about Taunton Cross, for stealing sheep; *or* burned in the hand or shoulder." And the court, after verdict for the plaintiff, were of opinion, that the words did not import any certain slander.

These decisions, however, can scarcely be considered as precedents at this day, since it is clear that a charge of felony may be completely conveyed by such disjunctive imputations; and were they not actionable, the legal consequences of slandering might in every case be easily avoided.

The same objection once prevailed, where the person and not the act was stated in the disjunctive.

The defendant said, "She* had a child, and either she OR somebody else made away with it!" And three justices against the opinion of Bridgman C. J. adjudged, that the words were not actionable. But in a subsequent† case this decision was overruled; and upon the same principle, no doubt, it would now be held, that words imputing a criminal act in the disjunctive, are also actionable.

From *adjective* words. Where the words impute inclination only, they are not actionable; as to say "J.‡ S. is a murderous villain!" But where the participle is used, it is otherwise; as to say, "J.‖ S. is a murthering villain!" The words in the

* Cart. 55, 56.

† Harrison v. Thornborough, 10 Mod. 196.

‡ Ld. Ray. 236.

‖ Cro. Car. 318.

former case importing an inclination only, in the latter an act done. So the words, "Dr.* Sybthorp is robbing the church," were held actionable; and to say such a person is robbing such a man, or ravishing such a woman, is actionable.

So, "Where is that long shag-haired, murthering, rogue?" was held actionable†.

For the words, "Traitorous knave," an action has been held maintainable, though not for the words, "Rebellious knave;" and perhaps this distinction may now be considered as good law, although many of the nice subtleties which were formerly in fashion are now disregarded; since, though traitorous be a mere adjective, not implying any act, yet the circumstance of the offence frequently consisting in intention only, may well constitute this case an exception‡ to the general rule.

It is laid down by Sir Edward Coke||, that sometimes adjective words will maintain an action, and sometimes not. They are actionable,

1. When the adjective presumes an act committed.

2. When they scandalize a person in his office or function, or trade, by which he gets his living. As if a man says, "That one is a perjured knave!" there must be an act done, for otherwise he cannot

* 1 Rol. Ab. 76.

† Cro. Car. 318. Jo. 326.

‡ Cro. Eliz. 171. Lev. 90.

|| 4 Co. 19.

be perjured. The words, "seditious* and thievish knave," have been held not actionable.

And the distinction has been frequently taken, that "thieving rogue," imports an act; "thievish rogue†," an inclination only.

So for the words, "You‡ are no thief!" an action lies, if they be spoken ironically.

And next, the imputation of an act may be inferred from a statement, which virtually includes or assumes the commission of the principal act, or a strong suspicion of it.

The defendant said, "I‖ could prove J. S. perjured, if I would!" and the words were held actionable; since, if true, J. S. must have committed an act of perjury.

So where the defendant said, "Thou§ art a rogue, a runaway rogue, and didst run away from Oxford; and thou art a rogue of record." The words were held actionable; for if true, the plaintiff must have been convicted of record.

The defendant said to the plaintiff, "In¶ Blackbull Yard you could procure broad money for gold, and clip it when you had so done." It was objected, that the words were not actionable, since

* 4 Rep. 19. Cro. J. 65, 66. 2 Bulst. 138. Ld. Ray. 236.

† Dorrell v. Grove, Freem. 279.

‡ 1 Vin. Ab. 430. pl. 8.

‖ 1 Vin. Ab. 406. pl. 2.

§ Sty. 220. 1 Vin. Ab. 415.

¶ Salk. 697. Speed v. Parry.

they merely imputed *a power*, and not an ACT. But the court held, that the limitation to place implied an act; for that, if a power alone had been meant to be imputed, the limitation to place would have been unnecessary—a power to do being the same at all places.

So in Horne v. Powell*. The defendant said, "You may well spend money at law, for you can coin money out of halfpence and farthings!" It was held, that the words were actionable, as implying an ACT; for by a *mere power*, the plaintiff could never be able to spend money at law.

The defendant said of the plaintiff, "He† was put in the round-house, for stealing ducks at Crowland;" and judgment was given for the plaintiff. For though the court were at first of opinion, that they were bound by former authorities, and that if judgment were to be given for the plaintiff, many actions would arise at every assizes in the kingdom, where the common topic of conversation is, that such a man was sent to gaol for such a crime; yet, afterwards, they changed their opinion, and held, that the jury having found the words falsely spoken, they clearly imported that the plaintiff had been guilty of a crime: that the objection was, that the words did not expressly allege that the plaintiff had stolen the ducks, but that words must be taken according to common parlance. And so in a number

* Salk. 697. † Beavor v. Hides, 2 Wils. 300.

of other cases, the asserting the plaintiff to have been confined or punished* for a certain offence, has been held actionable, since the imputation, at all events, throws strong suspicion upon him.

So where the defendant said, "He† is under a charge of prosecution for perjury; G. W. had the Attorney General's instructions to prosecute." It was held, that the words were actionable, as being calculated to convey the imputation of perjury.

So where the defendant said of the plaintiff, "His‡ character is infamous: he would be disgraceful to any society. Whoever proposed him must have intended it as an insult; I will pursue him and hunt him from all society. If his name is enrolled in the royal academy, I will cause it to be erased, and will not leave a stone unturned to publish his shame and infamy. Delicacy forbids me from bringing a direct charge; but it was a male child of nine years old who complained to me."

So where the defendant said, "I‖ dealt not so unkindly with you, when you stole my stack of corn."

The defendant said to a husband in London, "You§ are a cuckoldy old rogue!" and the words

* Cro. J. 247.

† Roberts v. Cambden, 9 East, 93.

‡ Woolnoth v. Meadows, 5 East, 463.

‖ Cooper v. Hawkswell, 2 Mod. 58.

§ 1 Str. 471.

were held actionable, since they imply, that the wife is a whore, for which, by the custom of the city, she is liable to temporal punishment.

Words imputing intention only to commit crime, are not actionable of themselves, unless in the case where the intention is of a treasonable nature*.

As, if one say to another, "Thou† wouldst have killed me," no action lies.

So for the words, "She‡ would have cut her husband's throat, and did attempt it," an action lies; because an attempt, that is an act, is charged; but in the same case it was held, that for the first words, "she would have cut her husband's throat," no action could be maintained.

2dly. Where the act charged is, in legal strictness, impossible.

Where a criminal charge is conveyed by the defendant's expressions, the liability to make reparation cannot be affected by any impropriety in the terms of the communication, whether legal or grammatical; since the loss of character, and its probable consequences, constitute the ground of action, without reference to the means employed. The contrary doctrine, indeed, at one time prevailed.

It has been holden, that if a married woman say,

* Cro. J. 407.

† Dr. Poe's case, cited by Coke and Haughton, 2 Buls. 266. 1 Vin. Ab. 440.

‡ Lane, 98. 1 Vin. Ab. 440. pl. 9.

"You* have stolen *my* goods," the words are not actionable, the words being repugnant; for since a married woman cannot have goods of her own, she cannot be robbed of any.

But in Charnel's case†, which was earlier than the preceding, the wife said, "My turkeys are stolen, and Charnel hath stolen them;" and the same objection being made in arrest of judgment, the court said, "The wife did charge the plaintiff with stealing her turkeys; and if a person who had no horse were to publish these words, 'J. S. hath stolen *my* horse,' the discredit would be as great to J. S. as if the publisher had had a horse; for every person who heareth the words may not know whether he had a horse or no." And in the subsequent case of Stamp‡ v. White, the defendant's wife said, "Thou art a thievish rogue, for thou hast stolen *my* faggots!" Although it was objected that the words were without meaning; since a married woman could not have property of her own, yet it was held, that the words were actionable; and it was to be understood according to common intendment, that the defendant charged the plaintiff with stealing *her husband's* faggots.

So where the defendant said, "These‖ guineas are Mr. Bendish's (the plaintiff's), and were *given me* to vote for him." It was urged, on motion in

* 1 Roll. Ab. 74. 6 Bac. Ab. 238.

† Cro. Eliz. 279.

‡ Cro. Jac. 600.

‖ 11 Mod. 174.

arrest of judgment, that the words are insensible; for that when the plaintiff has given money to the defendant, it cannot be the plaintiff's money; but judgment was given for the plaintiff.

The older cases, indeed, carried the doctrine of repugnancy to a very unreasonable extent; and the courts arrested judgments, not only on the ground that an actual inconsistency appeared on the face of the record, but even where no inconsistency appeared, because such might by possibility exist.

The rule, however, seems to be now established, that no inconsistency or want of grammatical propriety will prevent the words from being actionable, where the intention to charge the plaintiff with the commission of a crime plainly appears.

II. The CRIMINAL QUALITY of the matter charged must appear with certainty.

This may appear,

1st. From the use of general terms of known legal import.

2dly. From circumstances explaining the meaning of terms otherwise doubtful, or innocent.

3dly. From the mere description of the circumstances constituting the offence.

1st. From the use of terms of known legal import.

It seems once to have been understood, that no charge was actionable, when conveyed in terms, which did not particularize the circumstances of

the offence. So that to say a man was "a traitor*, or a thief," did not afford him a ground of action, unless he had sustained special damage from the words. And to such an extent was the nicety carried, that even in cases where the words did state some of the circumstances, it was held to be incumbent upon the plaintiff to prove that facts connected with the charge were partially true, in order to render it the more probable that he might have been placed in jeopardy by the accusation. And this affords reason to suppose that, originally, the *only* ground of allowing such an action, without proof of special damage, was, the danger to which the party was exposed of a criminal prosecution, to which he could scarcely have been subjected by a bare general charge, unsupported by any facts or circumstances which might give it colour.

Thus, in the case of Jacob† v. Mills. It was held, that for the words, "He hath poisoned J. S. and it shall cost me 100*l.* but I will hang him," no action was maintainable, because the plaintiff did not aver (and of course prove) that *J. S. was dead* at the time the words were spoken.

The defendant said, "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head; the one part lay on the one shoulder, and another part on the other." After verdict for the

* Bro. Action sur le cas. 27 H. 8. 11.

† Cro. J. 331. 343. 1 Vent. 117.

plaintiff, judgment was arrested, upon the ground that it did not appear that the cook was killed.

But in other cases, both prior and subsequent to the former, the same objection was overruled. In the case of Webb* v. Poor, the words were, "I will call him in question for poisoning my aunt, and I make no doubt to prove it." It was moved, in arrest of judgment, that the plaintiff had not averred that his aunt was poisoned; but the court would not allow the objection, saying, that the plaintiff's credit was impeached, whether she was poisoned or not. And the same point was ruled in Talbot† v. Case, where it was said, that the death of the person alleged to have been murdered would be intended, unless the contrary appeared. Still, however, it was held, that if it appeared that the person said to have been murdered was in fact living, no action could be maintained. The plaintiff‡ shewed in his declaration, that the defendant had a wife yet living; and that he said of the plaintiff, "Thou hast killed my wife; thou art a traitor!" and it was held that no action lay; and a distinction was taken between the case where the person stated to have been murdered was still alive, and where he was dead; that, the wife being alive, no action lies, although the defendant says that the plaintiff has murdered her; since it appears that

* Cro. Eliz. 569.

† Cro. Eliz. 823.

‡ Snagg v. Gee, 4 Rep. 16. 9. Cro. Car. 489.

no murder of her can have been committed, nor the plaintiff in any jeopardy: and so the words are vain, and no scandal or damage to the plaintiff.

To require the plaintiff to prove, that the party, with whose murder he is charged, is actually dead, would be highly unreasonable and inexpedient; since the slanderer might secure impunity by fixing either upon a fictitious person as the supposed victim of the murder, or upon some real person whose death the plaintiff might not be able to prove.

In the case of Snag v. Gee (cited by Sir E. Coke*, in his fourth report), it appeared upon the record, that the wife, alleged to have been murdered, was still alive; and the action was held not to be maintainable, because the plaintiff was not put in jeopardy by the words.

It cannot, however, fairly be inferred from this, that the plaintiff is in all cases precluded from recovering although the person, alleged to have been murdered, should be still alive; since the plaintiff's life may have been placed in jeopardy in consequence of the injurious report, though, in fact, at the time of pleading, or upon the trial, the defendant may be able to prove the person alleged to have been murdered to be still living. The words, if actionable without special damage, must be so immediately when spoken; and their actionable quality must then depend upon the fact, whether the hear-

* 4 Rep. 16. 9.

ers were aware that the person alleged to be murdered was really alive; if they did not know the fact, then all the consequences (the probability of which renders a charge of murder in any case actionable) may follow; since, unfortunately, several melancholy instances may be cited where an accused person has suffered for the supposed murder of one who survived him.

Should it, however, precisely appear, upon the plaintiff's own statement, that the person charged to have been murdered was alive when the words were spoken, perhaps it would be presumed that the hearers knew that fact.

The plaintiff* declared that the defendant said of him, "He is a base gentleman, and had three or four children by A. S. his maid servant; and after killed them or caused them to be killed;" and then averred, that he never was guilty of any incontinency with A. S. nor any other, nor of any such felony or murder. After verdict for the plaintiff, it was objected, in arrest of judgment, that inasmuch as he had averred that he never was guilty of any incontinency with A. S. it was all one as if he had averred that he never had any child by A. S. and that if he had so averred, no action would lie; for then it would appear to the court, that there was no such thing in *rerum naturâ* as is supposed to have been.

* 1 Vin. Ab. 409. pl. 4. Poph. 187. Jo. 141. Lat. 159. Cart. 55. Comb. 132.

killed. But it was adjudged for the plaintiff; because it was not *specifically averred* that he had no child by A.S. but only generally, that he was not incontinent with her.

And the like degree of particularity has been required in other cases where felony has been charged.

Thus, for the words, "Thou* hast committed burglary in breaking his house, and taking his goods." It was held, that no action was maintainable; it being uncertain, as no person was named, whose house and goods were meant. And, upon the same principle, a general charge of forgery† was held not to be actionable, without reference to some particular deed, instrument, or other subject matter. So it was held, that a general charge of subornation‡ of perjury was not actionable, unless it appeared that the perjury had been committed.

These doctrines have, however, been long exploded; and the rule seems to be perfectly established, that an action is maintainable for *a general imputation conveyed in apt terms.*

The establishment of this rule necessarily defeated another nicety, which has been alluded to as formerly countenanced by the courts, namely, that when the charge described any circumstances of the offence, it was incumbent upon the plaintiff to shew the existence of such particulars as might serve to give colour to the defendant's imputation

* Brown v. St. John, 1 Rol. Ab. 71.

† 3 Leon. 231.

‡ 6 Mod. 200.

since it would be absurd to allow a remedy against general charges where no colour could be shewn, and to deny it where the imputation was equally prejudicial, because it contained particulars, which particulars the plaintiff might be equally unable to prove.

As for instance, if for the words, "you committed a murder," the plaintiff be entitled to recover, it would be highly unreasonable in an action for the words, "You murdered J. S." to require him to prove that such a person as J. S. had existed, but was dead at the time the words were spoken.

It may next be proper to refer to a few cases where general words have been held actionable.

An action has been held maintainable for the words traitor*, murderer†, thief‡, sheepstealer||.

For charging another with felony§, perjury¶, subornation of perjury**, forgery††, robbery‡‡.

It was once held, that to call another a pick-pocket||||, did not amount to a charge of felony; this decision has, however, been overruled§§.

* Dal. 17. Bro. Ac. sur le cas. pl. 2. 27 H. 8. 14.
† Mo. 29.
‡ Ow. 47. 2 Buls. 134.
|| 3 Buls. 303.
§ Jo. 32, Cro. Car. 276. Poph. 210. Sty. 235.
¶ Ow. 62, Noy, 61. 1 Vin. Ab. 405.
** Cro. Eliz. 308. Cro. J. 158. 1 Rol. Ab. 41.
†† Jones v. Herne, 2 Wils. 87.
‡‡ Cro. J. 247.
|||| 3 Salk. 325.
§§ 11 Mod. 255.

Whilst the statutes against witchcraft remained in force, it seems that the term witch was not actionable, unless coupled with some act of witchcraft: the cases, however, relating to this offence, are so inconsistent with each other, and with any settled principle, as to appear incapable of affording any illustration of the subject of this treatise.

To charge one with having *cozened* another, has in a great number of cases, been held too indefinite to support an action. For instance, the defendant said, "Thou* art a cozening knave, and hast cozened me out of 500*l.*" and it was held that no action lay.

So to accuse† another of cheating is too general to support an action.

So to say, he‡ is a rogue, varlet, or the like, is not actionable.—So to say, "Thou‖ art a common filcher, a companion of cut-throats," &c.

So to say, "He§ is a bloodsucker, and not fit to live in the commonwealth; and his child, not born, is bound to curse him."

2dly. The *criminal quality* of the act imputed may appear from circumstances explaining the meaning of words otherwise doubtful or innocent.

* Hutt. 13. 1 Vin. Ab. 427. pl. 9. 3 Lev. 171. Cro. Eliz. 95 Ow. 47. Buls. 172. Show. 181. God. 284. Cro. J. 427.

† 2 Salk. 694.

‡ 4 Rep. 15. b. Ld. Ray. 1417.

‖ Cro. Eliz. 554.

§ Noy, 64.

In consideration of law, that is certain which can be rendered so: it is, therefore, of no importance whether the terms used be doubtful, or apparently innocent, provided it can be shewn that they could and did convey the offensive meaning which forms the ground of complaint.

An imputation of being *forsworn* is the most common instance of cases falling under this division, and has given rise to a numerous class of decisions.

It has been held, that to accuse another of having forsworn himself, generally, is actionable*; but it seems now perfectly settled, that the term is not actionable, unless it appear from the accompanying circumstances to have been meant and understood of such a forswearing as would constitute the offence of perjury†.

Thus, to say,‡ "A. B. being forsworn, compounded the prosecution," is actionable, since an indictable forswearing must have been intended.

So the term "forsworn" is actionable when reference is made to a court‖ in which false swearing would amount to perjury.

The defendant said, "Arthur§ Colome is a forsworn man, and hath taken a false oath in his deposition at Tiverton, where he waged his law against

* 2 Buls. 40.

† 4 Rep. 15. 2 Buls. 150. Holt v. Scholefield, 6 T. R. 691.

‡ Cro. Eliz. 609. 2 Rol. Rep. 410.

‖ Cro. Eliz. 720. 1 Vin. Ab. 406, pl. b. 7.

§ Cro. J. 204.

me;" and the plaintiff had judgment, the forswearing appearing by the description to have amounted to perjury.

To say, "Thou wert forsworn at such a trial*," (with reference to a trial where the offence of perjury might have been committed) is actionable.

Where reference is made to a particular court, the imputation is actionable, if perjury could have been committed there. In such case, however, it is incumbent on the plaintiff to shew that the perjury could have been committed.

The defendant said, "Thou† wert forsworn at Whitchurch court," and the words were held not to be actionable, because it did not appear that Whitchurch court was a court of record.

So it was held, that no action lay for saying, "He‡ has forsworn himself in Leake court," without shewing it to be a court which could compel the taking of an oath.

It is not necessary that the forswearing should be shewn to have been intended of a perjury within the statute of Elizabeth, since perjury is an offence punishable at Common Law‖.

So, although Ecclesiastical Courts are not mentioned in the statute of Elizabeth against perjury, yet an action lies for imputing a forswearing in an

* Cro. Car. 379. Lut. 1292.

† Cro. Car. 378.

‡ 1 Rol. Ab. 39. pl. 7. 6 Bac. Ab. 207.

‖ 1 Rol. Ab. 49.

Ecclesiastical Court.—The defendant said, "Thou* art a forsworn knave, and I will prove thee to be forsworn in the Spiritual Court;" and it was held that the action well lay; for the Ecclesiastical Court is a judicial court, and well known.

To say, "Thou† wast forsworn before my Lord Chief Justice, in evidence," is actionable.

So to say that another is forsworn before a Justice‡ of the Peace is actionable; or before such a person, naming him, provided it can be shewn with certainty, that the person so named was a Justice of the Peace.

The defendant said, "Thou‖ art a forsworn knave!" The plaintiff asked, "Where?" The defendant replied, "In Ilston court;" and the words were held actionable, the court alluded to being a Court Leet, where the offence might have been committed.

"Thou§ art a forsworn man; I will teach thee the price of an oath, and will set thee on the pillory." And the words were held actionable, because the defendant shewed that he meant to impute a perjury, for which the plaintiff ought to stand in the pillory.

* Shaw v. Thompson, Cro. Eliz. 609.
† Le. 127.
‡ Gurneth v. Derry, 3 Lev. 166. 4 Co. 17.
‖ Cro. Eliz. 720.
§ 1 Vin. Ab. 407. pl. 11.

The injurious import of the term *stealing*, has undergone much discussion.

In Baker* v. Pierce. The words were, "You stole my boxwood, and I will prove it." Upon motion in arrest of judgment, a long string of cases was cited for the defendant, in which the term stealing had not been considered as actionable; as where the defendant said, "You† are a thief, and stole my timber." "You‡ are a thief, and stole my corn, hops, and apples." "You‖ stole timber out of my yard." "You§ stole corn out of my yard."

All of which were decided upon the ground, that unless the additional words shew that a charge of felony was intended, they are to be taken in their mildest acceptation.

For the plaintiff, it was contended, that, "You have stolen my *timber*," is actionable; for it must be felled and severed from the stock, before it is timber, according to the distinction made in the old Hexameter—

"Arbor dum crescit, lignum dum crescere nescit¶."

Holt C. J. said, "The opinions of later times have been in many instances different from those of

* 6 Mod. 23.

† Cro. J. 65.

‡ 2 Brownl. 280.

‖ Cro. J. 673. All. 31. Hob. 331. Sty. 231.

§ Hob. 406.

¶ 1 Roll. Ab. 70. pl. 47.

former days in relation to words; for formerly there has been a difference taken between saying, "Thou art a thief, *and* hast stolen my wood;" and, "Thou art a thief, *for* thou hast stolen my wood." And judgments have gone both ways; but later opinions make no difference if the words be spoken at the same time. And these are scrambling things that have gone backwards and forwards, and the idle people in the country, that privately cut and carry away coppice wood, are in common parlance, called woodstealers." And he said, that, "Stealing, and feloniously stealing, are not the same; for in common parlance, stealing does not always import 'felony;' as, to cut and carry away furze is a stealing, but not a felonious stealing."

But Powell J. said, he always took it, that stealing, *ex vi termini*, did import felony. And afterwards, by the opinion of the whole court, the plaintiff had judgment, on the ground, as stated in the report, of all the later authorities*.

From this, and the later decisions upon this subject, it seems, that the term stealing takes its complexion from the subject matter to which it is applied, and will be considered as intended of a felonious stealing, if a felony could have been committed of such subject matter.

In modern construction and practice little doubt can arise upon these niceties which appear in for-

* 6 Mod. 23.

met times to have afforded abundant occupation to the courts. If, from the plaintiff's declaratory statement of his case, it appear, that the charge of stealing could not, from its application, have been meant to impute a felonious stealing: as if, for example, the defendant had said, "You stole an acre of my land;" the statement would be held bad upon demurrer; if it appeared upon the trial that the term had been applied in a sense not felonious, the plaintiff would be nonsuited; and, finally, if after verdict for the plaintiff it appeared, that the term as used was *capable* of a felonious sense, the verdict would be supported.

This doctrine is applicable to every other case where doubtful words, or even those apparently innocent, derive a criminal quality, either from context or collateral circumstances.

The defendant said, "Thou* art a clipper, and shall be hanged for it;" and the court, after a verdict for the plaintiff, said, that the words should not be taken to mean a clipping of clothes, but a clipping of money, for which the plaintiff might be hanged.

So for the words, "Thou† art a clipper, and thy neck shall pay for it," an action was held maintainable; for by the subsequent words it could not be intended of any other clipping than of money.

So when the statutes against witchcraft were in

* Walter v. Beaver, 3 Lev. 166. 2 Jo. 235. Cro. J. 255. 276. 1 Lev. 155.

† 3 Lev. 166.

force, the defendant said, "Thou* art a witch, and I will make thee suffer for a witch." After verdict for the plaintiff it was contended, that the words were not actionable; that it had been many times adjudged, that *witch* alone is not actionable; and that, "I will make thee suffer for a *witch*," are not; for it is not said suffer death; that it might be intended of a citation in the Spiritual Court, which was the usual way before the statute; or it might be by ducking in the water as the common people used to try those suspected of witchcraft. But it was answered by Rokesby and Neville Justices, that the words shall be taken as they are usually understood among neighbours in the country; to suffer is intended to suffer death; as they usually say, How many suffer at this Assizes? which is intended, suffer death. And thereto Treby C. J. after it had been twice moved, inclined. And at last judgment was given for the plaintiff by Treby C. J., and Rokesby and Neville Js.; Powell J. being of a contrary opinion, because words shall be taken in *mitiori sensu*, and the word suffer is wholly uncertain what manner of suffering was intended.

The defendant†, speaking of the death of one Daniel Dolly, said to the plaintiff, "You are a bad man, and I am thoroughly convinced that you are guilty; and rather than you should want a hangman, I would be your executioner." After verdict and

* 3 Lev. 394. † Peake v. Oldham, Cowp. 275.

judgment for the plaintiff, the defendant brought a writ of error in the court of King's Bench, assigning, as two grounds of error—

1st. That the words were not in themselves scandalous.

2dly. That they did not become so by reference to the death of D. D.

Lord Mansfield in affirming the judgment, observed, "It is argued that there are many innocent ways by which one man may occasion the death of another; therefore, the words, 'guilty of the death,' do not in themselves necessarily import a charge of murder; and consequently, as no particular act is charged (which in itself amounts to an imputation of a crime) the words are defectively laid. What! when the defendant tells the plaintiff that he has been *guilty* of the death of a person, is not that a charge and imputation of a very foul and heinous kind? Saying that such a one is the cause of another's death, as in the case in 2 Buls. 10, 11. is very different; because a physician may be the cause of a man's death, and very innocently: but the word *guilty* implies a malicious intent, and can be applied only to something which is universally allowed to be a crime. But the defendant does not rest here: on the contrary, in order to explain his meaning, he goes on and says, 'and rather than you should be without a hangman, I will hang you.' These words plainly shew what species of death the

defendant meant, and therefore in themselves manifestly import a charge of murder."

Where the words merely charge the plaintiff with being *deserving of punishment*, great doubt seems to have been entertained whether they are actionable, and there are many authorities both ways.

It has been held, that an action lies for saying, "If* you had your deserts, you had been hanged before now." For the court said, it should be intended to convey an imputation of an offence for which the penalty of death was due.

So the words, "He† hath deserved to have his ears nailed to the pillory," were adjudged actionable. But for the words, "Thou‡ art a scurvy bad fellow, and hast done that for which thou deservest to be hanged." It was held, that no action could be maintained. So the words, "Thou‖ shouldest have sate on the pillory, if thou hadst thy deserts," have been held not actionable, because too general.

Since a greater degree of precision has been required in modern times than formerly, the cases last cited may, perhaps, be considered as the better authorities.

If, however, the words import a conviction for some offence, it seems they are actionable.

* Cro. Eliz. 62.
† Cro. Eliz. 384.
‡ 1 Vin. Ab. 415. pl. 5.
‖ 1 Vin. Ab. 415. pl. 10. Mo. 243.

The defendant said, "You* are a branded rogue, and have held up your hand at the bar." It was held, that the words were actionable, since they imply that the plaintiff was branded according to the statute†.

So words or signs apparently innocent, or unintelligible, may, by explanatory circumstances, become actionable. The defendant said of the plaintiff, "He‡ is a healer of felons;" and the words having been spoken in one of the western counties, wherein "a healer of felons" signifies a concealer of felons, were, thus explained, considered actionable.

So the words, "He‖ is mainsworn," were held actionable, as published in a part of the kingdom where they were understood to convey a charge of perjury.

So, generally, in regard to words spoken in a foreign language, the only question is, whether they were understood by the hearers in an actionable sense?—If so understood, the mischief is effected, and the cause of action complete§.

Where the words are spoken in the Welch language, but in an English county, it must appear, that the hearers understood Welch; for otherwise

* All. 35.

† 1 Ja. c. 7.

‡ Hob. 126. Cro. Eliz. 250. Cart. 214.

‖ Hob. 126.

§ 1 Roll. Ab. 74. Cro. Eliz. 496.

the court will not intend that any there understood the Welsh tongue; and then it was not any slander any more than if any one spoke slanderous words in French or Italian, in which case no action will lie, unless it be averred, that some one there* understood those languages.

And as doubtful or apparently innocent words may, by circumstances, be shewn to be actionable; so may words apparently actionable be explained, by circumstances, to have been intended and understood in an innocent sense. Thus, though the defendant should say, "Thou art a murtherer," the words would not be actionable, if the defendant could make it appear that he was conversing with the plaintiff concerning unlawful hunting, when the plaintiff confessed that he killed several hares with certain engines, upon which the defendant said, "Thou art a murtherer," meaning a murtherer of the hares so killed†.

Formerly a distinction was taken between saying, "Thou art a thief, *for* thou hast stolen such a thing," as a tree, the taking of which could not be felonious, and the saying, "Thou art a thief, and hast stolen such a thing;" since in the former case the subsequent words shew the reason of calling the plaintiff a thief, and that no felonious imputation was meant; but in the latter, the action lies for calling him a thief, and the addition, "thou hast stolen," is another distinct sentence by

* Cro. Eliz. 865. † 4 Co. 13.

itself, and not the reason of the former speech, nor any diminution thereof*.

Little stress, however, would probably be now laid upon this distinction, since, in common discourse, *and* is frequently intended to mean *for*.

And even in the construction of legal instruments, instances are not unfrequent, where the vulgar and obvious acceptation of the word has been preferred to its strict grammatical signification†.

Brittridge brought an action for these words, "Mr. Brittridge is a perjured old knave, *and* that is to be proved by a stake parting the land of H. Martin and Mr. Wright." And upon motion in arrest of judgment, it was held, that although the words, "thou art a perjured knave," without any more, would have been actionable; yet, that upon all the words taken together, no action lay; for the latter words extenuate the former, and explain his intent, that he did not mean any judicial perjury; and therefore it was adjudged that the words were not actionable. But it was said, that if the plaintiff's counsel had disclosed the truth of the case in the declaration, the words would have maintained the action; for the truth of the case was, that in an action between Martin and Wright, the state of the controversy was, whether the stake stood upon the

* 1 Roll. Abr. 71. 2 Roll. R. 241. Hard. 7. All. 31. Sty. 66.

† 6 East, 486. Mo. 422. 1 Wils. 140.

land of the one or the other, or indifferently as a boundary between their lands. And in that action the plaintiff was sworn as a witness; and, by the pretence of the plaintiff, had perjured himself. But this special matter was not disclosed, and therefore it was decided for the defendant*.

Sir Edward Coke in his fourth report observes, that, "In case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking of them; for, "*Sensus verborum ex causa dicendi accipiendus est.*"

And again, "God forbid that a man's words should be, by strict and grammatical construction, taken by parcels against the manifest intent of the party, upon consideration of all the words which import the true cause and occasion, which manifest the true sense of them." This rule is so clear, and so well established, that any further illustration of it would be nugatory; and the questions which may arise, upon which party shall the *onus* of proving, or disproving the injurious intention and meaning be imposed? and how shall the defendant best avail himself of explanatory circumstances in his favour? will be afterwards considered under more appropriate divisions.

2dly. From the mere description of the circumstances constituting the offence.

* 4 Co. 18. Yel. 10. 34. 2 Rol. Ab. 343. Mo. 666.

In the older cases, much difficulty prevailed with respect to the actionable quality of words containing a mere enumeration of circumstances: it was doubted, in the first place, whether the circumstances, supposing them to be true, constituted an indictable misdemeanor; in the second, whether the imputing such a misdemeanor was a sufficient ground of action?

The affirmative of the latter question has already been attempted to be shewn. With respect to the first point, it may be proper to advance a few observations.

In considering the class of cases referable to this head, where offences have been charged not amounting to, but connected with, felony, it will be convenient to distribute them into imputations charging,

An *attempt* to commit a crime.

A *solicitation* to commit a crime.

Some *preparation* made in *contemplation* of the commission of a crime.

As to words charging an *attempt* to commit a crime.

In the case of Sir* Harbert Croft v. Brown, Coke C. J. observed, that, in ancient time, "*voluntas reputabatur pro facto;*" and that if a person lay in wait to kill another, and upon his resisting, wounded but did not kill him, it amounted

* 3 Bulst. 167.

to a felony at Common Law, and the offender was ousted of his clergy; that the intention, manifested by an overt act, constituted a felony.

The learned judge then proceeded to intimate, that any words charging an overt act done in pursuance of a felonious intention, would be actionable. But that in the principal case, the words, "He keepeth men to rob me," were not actionable, since they did not charge any way-laying or overt act done.

The words, "He* sought to murder me, and I can prove it," were held actionable.

In this case it may be observed, the words imported more than a mere inclination to murder; since the term *sought* is shewn by the latter words to refer to some overt act capable of proof.

But for the words, "Thou† wouldest have killed me," it was held that no action lay, since intention only was charged.

In Muney's case‡. Coke C. J. and Houghton J. held the words, "Thou art a knave, and hast laid in wait to kill me; and thou hast hired one W. to kill me," not actionable, because *no act* was laid to be done, but an intention only; and that a mere intent is not punishable.

It is remarkable, that the lying in wait, and hir-

* Cro. Eliz. 308.

† Dr. Poe's case, vid. 2 Buls. 206. 1 Vin. Ab. 440. pl. 9.

‡ 2 Buls. 206.

ing an assassin to murder another, should be considered as nothing more than mere intention; and this decision seems very inconsistent with the subsequent doctrine of Lord Coke in Sir Herbert Croft's case*; notwithstanding therefore, this and some other contradictory authorities, it may be collected from a general view of the cases, that the charging any attempt to commit a felony is actionable, since such an attempt constitutes an indictable offence†.

Where the words charge a *solicitation* to commit a crime.

The defendant said, "Mrs. Margaret Passie sent a letter to my Mr. and therein willed him to poison his wife." After judgment for the plaintiff, it was assigned for error, that the words were not actionable; because they did not charge any act done; and that it was not like charging the plaintiff with lying in wait to commit a murder; but all the justices and barons, besides Kingsmill, held, that the action lay‡.

The defendant said, "Tibbot‖ and one Gough agreed to have hired a man to kill me." And judgment was given for the plaintiff by Wray C. J. and Fenner J. against the opinion of Gawdy.

* 3 Buls. 167.

† 2 East, 6.

‡ Cro. Eliz. 747. cited by Williams J. Buls. 201.

‖ Cro. Eliz.

The defendant said, "You* set on folks to murder J. S." And Wylde J. conceived the words to be actionable, since the offence was indictable.

The defendant said, "John† Leversage would have robbed the house of J. S. if J. D. would have consented unto it. He persuaded J. D. unto it, and told him he would bring him where he should have money enough." And although it was objected in arrest of judgment, that the plaintiff could receive no prejudice from the words, which did not impute any act done, the plaintiff had judgment.

The defendant said, "He‡ bade J. S. to steal what goods he could, and he would receive them." And it was held, on motion in arrest of judgment, that the words were not actionable, since they merely charged the giving bad advice, and no act done.

But in Lady Cockaine's case‖. A charge of having solicited another to commit a felony, was held actionable. And in Sir Harbert Croft's case§ it was held, that to say, "A. did hire a man to rob me," would be actionable.

Where the words charge some *preparation* made in contemplation of the commission of a crime.

When a man does an act in itself indifferent, but

* West and Phillips, Keb. 253.

† Cro. E. 710.

‡ 2 Jo. 157.

‖ Cro. E. 49.

§ 3 Buls. 167.

in contemplation of the commission of a crime in future (since the act is not indictable), an imputation of it can scarcely be considered as actionable.—As if, for instance, a person were to purchase a pistol with the intent to commit murder at a future opportunity, the act would not, in law, amount to an indictable offence, though it might be a good ground for binding the party to his good behaviour. It is to be observed, however, that in Lady* Cockaine's case, the words charging her with having solicited a pregnant woman to kill her child, were held actionable; because, if true, there was cause to bind her *to her good behaviour*. The words, however, in that case, were clearly actionable upon another ground, and the reason given is insufficient, since it appears, from a variety of decisions, that many imputations for which, if true, the party might be bound to his good behaviour, are not actionable.

The defendant said, "He† keepeth men to rob me." And it was held, that the words were not actionable.

After some conversation about robbing a house, the defendant said, "It‡ was T. M. (the plaintiff) and J. D. that were about to rob E. C.'s house." After a verdict for the plaintiff, it was adjudged by Archer and Vaughan J. for the defendant. And it was said, that the *going with the intent to lie in*

* Cro. E. 49. † 3 Buls. 167. ‡ Freem. 46.

wait to kill a man was not indictable; but that the *lying in wait* with the same intent was indictable.

Upon the whole it seems, that where the words merely impute an act done in contemplation of the future commission of a crime, they are not indictable; unless it appear that the defendant intended to charge the plaintiff with having solicited, or conspired with, others for the purpose of committing the crime.

Where the description of the circumstances is precise, little doubt can arise. The defendant said, "You* have caused this boy to perjure himself." And the words were held actionable, since the facts charged constitute the offence of subornation of perjury.

So where the defendant said, "You† have bought a roan stolen horse, knowing him to be stolen."

The defendant said, "He‡ came to my door and set a pistol to my breast, and demanded money of me; and I, for safeguard of my life, gave him what money he desired." Roll. C. J. observed, If the words sound to charge him with felony, the action will lie; and three of the Justices decided for the plaintiff.

The defendant said of a justice of the peace and deputy lieutenant of the county of Warwick, "I

* Brownl. 2.

† Briggs's case, God. 157.

‡ Neve v. Cross, Sty. 350.

have heard that a maid of J. K.'s should report, that he being sick and she looking through a hole of the door where he then lay, saw a priest (innuendo—a popish priest) give the eucharist and extreme unction to Sir J. K." It was moved in arrest of judgment, that these words did not amount to calling him a papist; since it did not appear that the priest was a popish priest, unless by an innuendo. But it was, after two arguments, resolved, that the words taken altogether were actionable, and explained one another; that a priest who gives the extreme unction, must be a popish priest, and he that receives it a papist; and the judgment given for the plaintiff in the Common Pleas, was afterwards affirmed in the King's Bench*.

The defendant said, "Thou† didst violently, upon the highway, take my purse from me, and four shillings and two-pence in it; and didst threaten me to cut me off in the midst, but I was forced to run away to save my life." And the words, which in fact amount to a description of a highway robbery, were held actionable.

III. That the criminal act was meant to be imputed to the *plaintiff*.

The application of the injurious charge to the plaintiff may be collected, generally, from any circumstances indicating the intention of the defen-

* Sir John Knightly v. Marrow, 3 Lev. 68.

† Lawrence v. Woodward, Cro. Car. 177.

dant, so to apply his words, and inducing the hearers to suppose that the plaintiff was the person meant.

Thus, if the defendant should say, "I* know what I am, and I know what the plaintiff is; I never did such an act," (specifying some criminal act,) the words would be actionable, provided the hearers understood the offence to have been imputed to the plaintiff by such words.

Where a charge has been imputed to one of several, without specifying him, it has been held in many of the older cases, that no action was maintainable by any of them. The defendant said to three men who had given evidence against him, "One† of you is perjured." And upon an action brought by one of them, it was adjudged, that no action lay.

And so it has been held, that for the words: "One of my brothers is perjured," Although one of the brothers should bring an action, and aver that the words were spoken concerning him, yet that on account of the apparent uncertainty, no action would be maintainable‡.

But it has since been held, that for the words, "A.‖ *or* B. murdered C." either A. or B. might bring an action.

* 2 Lev. 150. Snell v. Webling, 1 Vent. 276.

† Cro. Eliz. 497.

‡ Per Tanfield J. in Wiseman v. Wiseman, Cro. J. 107.

‖ 10 Mod. 196. Cart. 56.

If from the plaintiff's statement it appear, that he *could have been meant*, the finding of the jury for him will be conclusive as to the defendant's application of the charge to him, since otherwise they could not have given him damages.

The application may be ascertained by a variety of circumstances; as from his having been* the subject of previous† conversation, or from his being described by name.

The plaintiff was a justice of the peace, and *Receiver* of the Court of Wards, and by reason thereof received great sums of money for the king, and was used with much confidence by the king; and the defendant, speaking concerning him with one Thomas Whorewood, spoke these words, "Mr.‡ *Deceiver* hath deceived the king." After a verdict for the plaintiff the court, on motion in arrest of judgment, held, that the action well lay; that the words "Mr. Deceiver," were an ironical allusion and nickname to his office and place; and that if such crafty evasions should be admitted, it would be an usual practice to slander *sans* punishment.

If A. B. say to C. D. before whom E. F. is walking, "He|| that goeth before thee is perjured," an action lies, if it appear that none but E. F. was walking before C. D. at the time of speaking.

* 1 Rol. Ab. 85. 1 Rol. Ab. 75.

† Cro. J. 587. 6 Bac. Ab. 231.

‡ Sir Miles Fleetwood v. Curl, Cro. J. 557.

|| 1 Rol. Ab. 81.

In the case of J. Anson* v. Stuart, the plaintiff was thus described in the libel—"This diabolical character, like Polyphemus the man-eater, has but one eye; and is well known to all persons well acquainted with the name of a certain noble circumnavigator (meaning by the last mentioned words to allude to the name of the plaintiff, *J. Anson*).

From these† and a number of similar instances, it may be laid down as a general rule, that the application of the words to the plaintiff is a matter to be collected by the jury, from the particular circumstances of each case.

The difficulties which occur upon this point, are generally of a technical nature, and consist in the doubt, whether the plaintiff has so stated his case in the declaration as to shew that the conclusion could properly be drawn: the consideration of these, however, belongs to a subsequent division of the subject.

* 1 T. R. 748.

† Cro. Eliz. 497. Cro. J. 444. 2 Bernard. Rep. Hughes v. Winter, Keb. 525.

CHAPTER II.

Where an infectious Disorder is imputed.

ANOTHER branch of cases where the law allows an action to be maintained, without the usual proof of special damage, consists of those where a person is charged with having an infectious disease, the effect of which imputation, if believed, would be to exclude him from society.

It has been said*, that, "Since man is a being formed for society, and standing in almost constant need of the advice, comfort, and assistance, of his fellow creatures, it is highly reasonable that any words which import the charge of having a contagious distemper, should be in themselves actionable; because all prudent persons will avoid the company of one having such a distemper."

Since the ground of proceeding is the presumption that the plaintiff will be wholly or partially excluded from society and its comforts, the action is consequently confined to the imputing those disorders which are so infectious in their nature, and pernicious in their effects, as to render the person afflicted an object likely to be shunned and avoided.

Actions for words of this description seem, in

* 6 Bac. Ab. 212.

the absence of special damage, to have been confined to charges of leprosy and lues venerea. For though it was held, that an action lay for saying, "He* buried people who died of the plague in his house," it appears that special damage was laid and proved.

There is, however, one case in which it has been held, that to charge another with having the "falling† sickness," is actionable.

So great, formerly, was the dread of leprous contagion, that an especial writ was provided for the removal of the infected object to some secluded place, where he might no longer be a terror to society: happily this writ has long lost its use.

It seems, however, that though the reason has in some degree ceased to operate, an action will, even at this day, be sustainable for a charge of either of the diseases‡ alluded to.

From the case of Villars and Monsley||, it appears, that to say another has the *itch*, is not actionable; though such an accusation would be actionable if written. It is to be remarked, that in the above case both Wilmot C. J. and Gould J. seem to take for granted, that to impute the plague is actionable; but no case was cited in which this point has been expressly determined.

* Kit. 173. b. 1 Com. Dig. 252.

† 1 Rol. 44. l. 7.

‡ Carslake v. Mapledoram, 2 T. R. 473.

|| 2 Wils. 403.

The ground of the action being the presumption of the plaintiff's exclusion from society, no action will lie for an imputation in* the past tense, since such an assertion does not represent the plaintiff, at the time of speaking, as unfit for society, and therefore the substance of the action is wanting; and it was observed, in the case of Carslake v. Mapledoram, that this doctrine was justified by all the cases, except one, and that loosely reported.

With respect to the terms in which the imputation is conveyed, as in other cases, they may either expressly and by their own power impute the disease, or by the aid of collateral circumstances may render the implication unavoidable.

Thus, to say† a man has the leprosy, or to call him leprous knave, is actionable: the term leper being in itself a clear and unequivocal designation of the speaker's meaning.

Without citing the disgusting string of cases upon this subject, with which the older reports abound, it may be deemed sufficient to observe, that wherever it can be collected from the circumstances, that the speaker intended the hearers to understand that the person spoken of was at the time of speaking, afflicted with either of the disorders above mentioned, an action may be maintained. And the meaning may be evidenced either by reference to

* Carslake v. Mapledoram, 2 T. R. 473. Str. 1189.

† 2 T. R. 473. Cr. J. 144.

the mode in which the disease was communicated, the symptoms* with which it is attended, its effects upon the person† or constitution, the means‡ of cure, the necessity of avoiding‖ the person infected; or, in short, by any other allusion capable of conveying the offensive imputation.

* Holt. 563.

† Cro. J. 430. 144. 1 Vin. Ab. 488. Cro. El. 214. 289.

‡ Cro. J. 430. Cro. Eliz. 646. Roll. Rep. 420.

‖ Cro. J. 430.

CHAPTER III.

Where the Imputation affects a Person in his Office, Profession, or Business.

NEXT to imputations which tend to deprive a man of his life, or liberty, or to exclude him from the comforts of society, may be ranked those which affect him in his office, profession, or means of livelihood. To enumerate the different decisions upon this subject would be tedious, and to reconcile them impossible; yet they seem to yield a general rule, sufficiently simple, and unembarrassed, namely, that words are actionable which directly tend to the prejudice of any one in his office, profession*, trade, or business.

Observations upon this class of cases may be divided into those relating to the *grounds of the action,—the extent of the action,*—and *the degree of certainty and precision requisite to render the words actionable.*

Words which affect a person in his office generally are actionable, whether the office be merely confidential, and honorary, or be productive of emolument. The ground of action in the two cases,

* 3 Wils. 186.

seems, however, to be somewhat different. Where his office is lucrative, words which reflect upon the integrity or capacity of the plaintiff render his tenure precarious, and are therefore *pro tanto* a detriment in a pecuniary point of view; but where the office is merely confidential the presumptive loss of emolument cannot supply the ground of action.

The whole class of cases in which magistrates, and others (whose offices are merely confidential and honorary) have been allowed to recover a pecuniary compensation for words relating to their official character, seems to rest upon more dubious principles than any other in which a remedy is given without proof of specific loss. For since even the loss of office itself would not be attended with any loss of emolument, such as would naturally result from deprivation of liberty, or exclusion from society, the evil seems scarcely capable of pecuniary admeasurement. Besides, the bad consequences which arise from degrading the magistracy, are of a public nature, and are therefore rather a matter of civil than of criminal cognizance, especially since the damages in a civil action are not considered as of a penal nature, but given as a private compensation to the party injured. It has long, however, been fully established, that words are equally actionable whether the office or profession to which they relate be lucrative or merely confidential.

So that words spoken of Justices of the Peace,

or physicians, or barristers, are frequently actionable, although the office of the first is merely confidential, and the latter are not in legal contemplation entitled to demand the payment of fees. Where the office is merely confidential, a singular distinction has been taken between words imputing want of *ability* in the holder, and those which charge him with want of *integrity*.

It has been held, that to charge a person in such an office with any corruption, or with any ill design or principles, is actionable; but that to represent him as wholly incompetent, in point of ability, to hold the office, is not a slander for which an action is maintainable. The reason assigned for the distinction is so remarkable, that it may be proper to give it in the words of C. J. Holt.

He says*, "It has been adjudged, that to call a Justice of the Peace, blockhead, ass, &c. is not a slander for which an action lies, because he was not accused of any corruption in his employment, or any ill design, or principle; and it was not his fault that he was a blockhead, for he cannot be otherwise than his Maker made him; but if he had been a wise man, and wicked principles were charged upon him when he had not them, an action would have lain; for though a man cannot be wiser, he may be honester than he is. If a person be in a place of profit and he is accused of insufficiency,

* Howe v. Prynn, Holt, 653. Salk. 694.

he shall have remedy by action. 'Tis otherwise if he be only in a place of honour; though even there, if he is charged with ill principles, and as disaffected to the government, he shall have an action for such scandal to his reputation."

In the case of Onslow* v. Horne, L. C. J. De Grey, in giving judgment, observed, "It was objected at the bar, on the side of the defendant, that words spoken of an officer, or magistrate, are not actionable, unless they carry an imputation of a criminal breach of duty. I will not give this my sanction, because I think for imputation of ignorance to one in a profession or office of profit, an action will certainly lie."

The reason for the distinction as given by C. J. Holt, assumes the imputation to be true, in which case the defendant would, as the law now stands, be enabled to justify; but the real question seems to be, not whether a man can help the natural dullness of his faculties, but whether a person is justified in falsely imputing to the holder of an office, the want of an essential qualification for that office. After it had been established that a magistrate might recover a pecuniary compensation for words which rendered his tenure precarious, the action in reason and principle extended itself to all imputations which could affect that tenure, and since gross ignorance is as sufficient a cause of de-

* 2 Wils. 106.

privation as corruption, it seems difficult to say why an imputation of the former kind should not be actionable as well as of the latter; the malice of the author, the falsity of the charge, and its probable consequences, being in the two cases precisely similar. It may be added, that the distinction is inconsistent with the class of cases in which barristers and physicians (whose situations are in law considered merely honorary) have been allowed to recover for words imputing want of ability, as well as for those which charged them with want of integrity.

The case of Bill* v. Neal was a precedent for the opinion of C. J. Holt, in the case of Howe v. Prinn†. There Foster C. J. and Wyndham and Twysden Js. decided against the opinion of Mallet J. that the words, "He is a fool or ass, a beetle-headed justice," were not actionable. But the three justices founded their opinion upon the cases of Sir John Hollis v. Briscow‡, and of Hammond‖ v. Kingsmill.

In the former case the plaintiff was a Justice of the Peace and Deputy Lieutenant of a county, and the defendant said to his servant, "Your master is a base rascally villain, and is neither nobleman, knight, or gentleman, but a most villainous rascal, and by unjust means doth most villainously take

* 1 Lev. 52. † Holt, 652.
‡ Cro. J. 58. ‖ 7 J. 1.

other men's rights from them, and keepeth a company of thieves and traitors to do mischief, and giveth them nothing for their labour but base blue liveries, and this all the country reports, and other good he doeth not any." And the defendant had judgment, chiefly on the ground, that the words were to be construed according to the now exploded doctrine of the *mitior sensus*, for which reason the case can scarcely be considered as an authority. In the latter case, the words were, "He *was* a debauched man, and not fit to be a justice." But it appears* that the judgment in that case was given for the defendant because the words were spoken of a time past; and Twysden J. said, that it would have been otherwise if the words had been, "He is a debauched man." The two cases, therefore, upon which reliance was placed, in the case of Bill v. Neale, were no authorities for that decision.

Where words relate to a man's official character, the danger of exclusion from office gives rise to the action. It was held, indeed, that an action was maintainable for the words, "When † thou wert a justice, thou wert a bribing justice." And it was said, that though they refer to a thing past, yet they defame him for ever in other people's opinions, and make him accounted unworthy to bear office afterwards. The authority, however, of this decision appears very suspicious, and the reason given

* 1 Vent. 50. Sir J. Herle v. Osgood. † Yel. 153.

would apply to every case where general want of integrity is imputed to a private individual, since it may by possibility have the effect of preventing him from being put into the commission.

C. J. De Grey*, in giving judgment in Onslow v. Horne, said, "I know of no case, wherever an action for words was grounded upon eventual damages, which may possibly happen to a man in a future situation, notwithstanding what the Chief Justice throws out in 2 Vent. 366., where he is made to say, 'That where a man had been in an office of trust, to say he behaved himself corruptly in it, as it imported great scandal, so it might prevent his coming into that or the like office again'; I think the Chief Justice went too far."

And where an action is brought for words spoken of a barrister or physician, it must appear that he practised† as such at the time the words were spoken; for otherwise the words could not have affected him professionally. A doubt has been raised, whether damages are properly recoverable by barristers and physicians for words relating to their professions, since their fees are merely honorary and not demandable in a court of law‡; the actual decisions, however, upon the subject, leave no doubt as to their right to recover for such

* 3 Wils. 188.

† 6 Bac. Ab. 215. Ib. 216. Sty. 231. Poph. 207.

‡ 6 Bac. Ab. 215.

words; and if their situations be considered as merely confidential, their right to recover rests upon the same foundation with that of magistrates and others, whose offices are of a similar description.

As to the extent of the action:

The action appears to extend to all offices of trust or profit, without limitation, provided they be of a temporal nature. Thus it has been held, that an action is maintainable for words spoken of a churchwarden*.

It has been said, that to call† an escheator, coroner, sheriff, attorney, or such as are officers of record, "extortioner," an action lies; but that for calling a bailiff or steward of a base court, who are not officers of record, "extortioner," no action lies; because extortion cannot be but in such as are officers of record.

There seems, however, to be little force in this distinction, since it has been held that any man is punishable for extortion‡.

It was held, that for saying of the deputy of Clarencieux, king of arms, that he was‖ "a scrivener, and no herald," an action was maintainable. So.

* Sty. 338. 1 Vin. Ab. 463. Cro. J. 339. 2 Bulst. 215. Cro. E. 358.

† Dal. 45. pl. 35. 1 Vin. Ab. 463.

‡ Dal. 42. 1 Vin. Ab. 463.

‖ Cro. El. 328.

for words of the master of the mint*; of a clerk to a public company†; of a town clerk‡; of a steward‖ of a court.

But where the defendant§ said of a member of parliament, "As to instructing our members to obtain redress, I am totally against that plan; for as to instructing Mr. Onslow (the plaintiff), we might as well instruct the winds, and should he (the plaintiff) even promise his assistance, I should not expect him to give it us;" after verdict for the plaintiff, judgment was arrested, and it was observed by C. J. De Grey, on that occasion, that the words did not charge the plaintiff with any breach of his duty, his oath, or any crime or misdemeanor, whereby he had suffered any temporal loss in fortune, office, or in any way whatever.

The action extends to words spoken of men in their profession, as barristers¶, attornies**, physicians††, and clergymen‡‡.

And to words affecting a person in the particular art by which he gains his livelihood. As of a school-

* Leo. 88.
† Cro. El. 358.
‡ Hutt. 23.
‖ 1 Roll. Ab. 56.
§ Onslow v. Horne, 3 Wils. 177.
¶ 2 Vent. 28.
** 1 Lev. 297.
†† 1 Roll. Ab. 54. per Twisden, 1 Ven. 21. Cro. Car. 270.
‡‡ Al. 69. 3 Lev. 17. 1 Roll. Ab. 58. Str. 946.

master*: it has been held, indeed, that to slander a schoolmistress, who taught children to read and write, in her profession, was not actionable. The authority of the dictum, however, appears questionable. It was decided in the case in which it is reported to have been delivered, that to accuse a midwife† of ignorance in her profession was actionable; and it is difficult to say, upon what principle a schoolmistress is not as much entitled to the protection of the law against malicious attacks, by which her means of living are likely to be impaired, as a midwife.

So any words tending to injure a merchant or tradesman are actionable; whether they reflect upon the honesty of his dealings, his credit, or the excellence of the subject matter in which he deals.

And the action seems to extend to words spoken of a person *in any lawful employment*, by which he may gain his livelihood.

The defendant said‡, "Thou hast received money of the king to buy new saddles, and hast cozened the king, and bought old saddles for the troopers." And the words were held actionable; for it was said, it was not material what employment the plaintiff held under the king, if he might lose his employment and trust thereby, and that it was im-

* 1 Roll. R. 72. Het. 71.

† 1 Mod. 21.

‡ Mar. 82. 1 Vin. Ab. 465. pl. 10. Sir R. Greenfield's case.

material whether the employment was for life or for years.

The defendant* said of a person employed by the under-postmaster to carry about post letters, on which he had a profit, "He has broken up letters, and taken out bills of exchange." After verdict and judgment for the plaintiff, one cause of error assigned was, that no action would lie for scandalizing such an employment; and Hale was of opinion, chiefly from the quality of the employment, that the judgment ought to be reversed; for he said that a man should not speak disparagingly of his cook or groom, but an action would be brought, if such action could be maintained.

The humility of the employment or occupation seems, however, to be no objection to the action either in law or reason; and it has long been clearly established, that an action is maintainable for malicious misrepresentations of the characters of menial servants,—a subject which will afterwards be more fully considered.

In the case of Seaman v. Bigg†, in the reign of Cha. I., it was held, that the words, "Thou art a cozening knave, and hast cozened thy master of a bushel of barley," spoken of a servant in husbandry, were actionable; and the court said, that though true it is, generally, an action will not lie for calling one cozening knave, yet where they be spoken of one who is a servant, and accomptant,

* 1 Vent. 275. † Cro. Car. 480.

and whose credit and maintenance depends upon his faithful dealing, and he by such disgraceful words is deprived of his livelihood and maintenance, there is good reason it should leave an action for loss of his credit and means. So the words, "He* is a cheating knave," applied to a lime-burner in his employment, have been deemed actionable.

But a jobber† or dealer in the public funds, is not considered as a known trader, and possessing a character as such.

It does not appear necessary, that the party should gain his living in the character to which the slander is applied, but it is sufficient, if he habitually act in that character, and derive emolument from it.

The rule, however, does not seem to extend to representations, which affect nothing more than casual instances, in which the plaintiff has assumed such a character. So that words misrepresenting the value of a horse, or particular piece of furniture, which the proprietor wishes to dispose of, would not be actionable, unless some special damage resulted from them.

Next as to the degree of *certainty and precision* requisite to make the words actionable.

The only question arising upon this point seems to be—do the words in any degree prejudice the plaintiff in his office, profession, or employment?

* 1 Lev. 115. Terry v. Hooper.

† 2 Bos. & Pul. 284.

if they do, they are actionable; the quantum of damage being a mere question of fact for the consideration of the jury.

Words in general belonging to this class must relate to the plaintiff's *integrity*, his *knowledge, skill, or diligence*, his *credit*, or to the *subject matter in which he deals*.

The effect of such imputations will be separately considered.

To impute want of integrity to any person who holds an office of trust or of profit is actionable: as to say of a judge*, that "His sentence was corruptly given."

Or, of a justice of the peace†, "I have often been with him for justice, but could never get any thing at his hands but injustice."

Or, "He coverth and hideth felonies ‡, and is not worthy to be a justice of the peace."

Where a person holds an office or situation, in which great trust and confidence must be reposed in him, words impeaching his integrity generally, and without express reference to his office, are actionable; since they must necessarily attach to him in his particular character, and virtually represent him as unfit to hold that office or situation.

Thus it has been held, that to say of a bishop, "He is a wicked man||," is actionable.

* Cro. Eliz. 305.

† Cro. Car. 14.

‡ 4 Rep. 16.

|| 2 Mod. 152.

The defendant said of a justice of the peace and deputy lieutenant*, "He is a Jacobite, and for bringing in the prince of Wales and popery." And the words were held actionable, though it did not appear that the speaker applied the words to his offices, because, without any such application, they imputed such religious opinions and political principles, as rendered him in law unfit for those situations.

So where the defendant said of the plaintiff, who was a justice of the peace†, "I am in danger of my life, my blood is sought, and I was like to have been murdered; I was at Sir J. Harper's (the plaintiff's) house, and John Harper drew me forth to see a gelding in the stable, and then Thomas Beaumond, Sir H. Beaumond's son, did throw his dagger at me twice, and thrust me through the breeches twice with his rapier to have killed me, all this was done by the instigation of Sir J. Harper, and I can prove it."

In this case, although no misconduct in office was particularly pointed out, it was held that the action well lay; the instigation to do such an outrageous act being against the plaintiff's oath, and a great misdemeanor, for which he was liable to fine and to be put out of the commission.

The defendant said to the plaintiff, who was one

* How v. Prinn, Holt, 652.

† Sir J. Harper v. Francis Beaumond, Cr. J. 56.

of the attorneys or clerks of the King's Bench, and sworn to deal duly without corruption in his office, "You are well known to be a corrupt man, and to deal corruptly." And upon giving judgment for the plaintiff, it was said, *quod sermo relatus ad personam, intelligi debet de conditione personæ*.*

The defendant said of the plaintiff, who was an attorney, generally†, "He is a common barretor." After verdict, though it was objected, that the words were not actionable, having been spoken of the plaintiff as a common person, and not in relation to his office, yet the court held that the action was maintainable, since it is a great slander to an attorney to be called and accounted a common barretor, who is a maintainer of brabbles and quarrels, and said that words are to be construed *secundum conditionem personarum* of whom they are spoken.

The defendant said of an attorney‡, "Thou art a false knave, a cozening knave, and hast gotten all that thou hast by cozenage, and thou hast cozened all that have dealt with thee." And the court held that the words were actionable, as touching the plaintiff in his profession.

An attorney brought an action for the words‖, "I have taken out a judge's warrant to tax Phillips's (the plaintiff's) bill, I'll bring him to book,

* 4 Rep. 16.

† Cro. Car. 192.

‡ Cro. Jac. 586.

‖ Phillips v. Jansen, 2 Esp. 624.

and shall have him struck off the roll." Lord Kenyon C. J. ruled, at nisi prius, that the words were not actionable; and added, had the words been, "He deserves to have been struck off the roll," they would have been actionable.

With respect to this distinction, it may be proper to suggest a doubt, whether the words in the principal case cited would not in common acceptation convey to the hearer the same meaning with the words which the learned judge is reported to have deemed actionable, since they seem as clearly to evince the opinion of the speaker, that the plaintiff deserved to be struck off the roll, and no one would choose to employ an attorney who made exorbitant charges.

Words imputing dishonesty to a tradesman, it seems, are not actionable, unless spoken with reference to trade. So that to call* a tradesman a cheat, generally, has been held not actionable. But otherwise to say, "He† keeps false books," for the words evidently relate to his course of trading. So to call a tradesman a rogue‡ or a cheat, with reference to his trade, is actionable. But to say generally of such a person, "Thou‖ hast no more than what thou hast got by cozening and cheating," has been§ held not actionable.

It may, however, be doubted, whether there is

* 3 Salk. 326.
† Holt, R. 39.
‡ Burr. 1688.
‖ 12 Mod. 307.
§ 12 Mod. 307.

any solid distinction between these cases, since every tradesman's livelihood depends in some measure upon his general character for honesty and integrity; and it is difficult to suppose, that a general imputation of dishonesty, if believed, would not operate to his prejudice. It seems that trust and confidence must be reposed in the plaintiff, in order to render words reflecting upon his character for integrity actionable. Thus the words of a carpenter,* "He has charged Mr. Andrews for 40 days' work, and received the money for the work, that might have been done in 10 days, and he is a great rogue for his pains," were, after verdict, held not to be actionable.

The distinction seems to be this: Where great confidence must necessarily be reposed, as in an attorney or superintendant, words generally reflecting upon his character are actionable; but where mere ordinary confidence is reposed, in the common course of honest dealing, as that a tradesman shall charge a fair price for his goods, or an artificer, surveyor, or mechanic for his labour, the law holds the words not to be so injurious as to bear an action unless they are applied to the plaintiff's trade or business with certainty and precision. So where the office, profession, or employment of the plaintiff, requires great talent and high mental attainments, general words, imputing want

* Lancaster v. French. Str. 797.

of ability, are actionable without express reference to his particular character, since they necessarily include an inability to discharge the duties of such a situation; but where the employment is of a mere mechanical nature, the words to be actionable must be applied to it clearly and unequivocally.

Thus, to say of a barrister* generally, that he is a "dunce," is actionable, the word dunce being commonly taken to mean a person of dull capacity who is not fit to be a lawyer.

So, to say of a physician†, that he is "no scholar" is actionable, a learned education being considered as an essential qualification in the medical profession.

To say of a servant, that he is a "lazy, idle, and impertinent fellow," is actionable; for these words, though spoken without express reference to his service, cannot but affect his character as a servant, since no one would be willing to employ a person whose general characteristic was idleness and impertinence.

In general, however, the words must be spoken with reference to the particular situation of the plaintiff, in which case they are actionable if they impute any want of knowledge, skill, or diligence, in the exercise of his office or avocation: as to say

* Peard v. Johnes, Cro. Car. 382.

† 6 Bac. Ab. 215. 1 Roll. Ab. 54. Cro. Car. 270.

of an apothecary—*"It is a world of blood he has to answer for in this town: through his ignorance he did kill a woman and two children at Southampton; he did kill J. P. at Petersfield; he was the death of J. P.; he has killed his patient with physick."

So† where the defendant said of a midwife,—"Many have perished for her want of skill."

The words spoken of a watchmaker were, "He‡ is a bungler, and knows not how to make a good piece of work." After verdict for the plaintiff, the words, on motion in arrest of judgment, were held by the court not to be actionable, not having been laid to be of the plaintiff's trade; but it was said that had the words been, "he knows not how to make a good watch," they would have been actionable. It may, however, be doubted whether this case would not now meet with a different decision; the point upon which the court gave judgment, was in a great measure technical; and indeed the averment, that the words were spoken in derogation of the plaintiff's workmanship, seems scarcely necessary, for if it were believed that the plaintiff was a bungler, and could not make any piece of work well, how could it be supposed that

* Tutty v. Alewin, 11 Mod. 221.

† Flower's case, Cro. Car. 211.

‡ Redman v. Pyne, 1 Mod. 19.

he could make a good watch, a piece of work requiring very considerable skill and dexterity.

The law has shewn great tenderness in protecting merchants and traders against imputations upon their credit, which if believed must necessarily operate to their serious prejudice. Formerly*, indeed, it was held that the words, to support an action, must import bankruptcy: this doctrine has, however, long been abandoned, and it seems that such words spoken of a person in any business are now considered as actionable. It is not essential to the action, that the words should impute want of credit at the time of speaking them. The defendant said "He† came a broken merchant from Hamburgh;" and the words were held actionable, since the plaintiff was charged with having been once broken, *et qui semel est malus semper præsumitur esse malus in eodem genere*, and that they were a cause of discrediting the plaintiff in his trade, and of injuring him in his credit, which was a great means of gain. And it is not necessary that the words should be spoken with express reference to the plaintiff's trade, since a general charge of want of credit necessarily includes the particular one, and is equally pernicious with a more precise allegation. Thus, to say generally of a merchant, that he is "*bro-*

* Holt, 29. † Cro. Car. 387.

ten," is actionable, these being common and vulgar words of one who fails in his credit and becomes a bankrupt. Words of this class are actionable when applied to a person carrying on a business purely mechanical, so that to call a dyer*, bankrupt knave is actionable.

And any words which in common acceptation imply want of credit are sufficient, as to say of a taylor†, "I heard you were run away." Formerly, indeed, it was held that to call a trader "bankruptly knave"‡ was not actionable; but the distinction between words adjectively spoken, and those containing an express and direct allegation, have, as has already been observed, been long deservedly disregarded.

So, to say of a stock-broker||, that he is "a lame duck" is actionable.

So of a trader "You are a sorry pitiful fellow and a rogue, and compounded your debts for 5s. in the pound§."

So where the defendant said¶ "All is not well with Daniel Vivian; there are many merchants who have lately failed, and I expect no otherwise of Daniel Vivian."

* Cro. J. 585.
† Davis v. Lewis, 7 T. R. 17.
‡ Cro. J. 343.
|| Morris v. Langdale, 2 B. & P. 84.
§ Ld. Raym. 1480. Str. 762.
¶ 3 Salk. 326.

So, to say of a pawnbroker* "He is a broken fellow."

To a milliner†, "You are not worth a farthing."

So though words merely import the speaker's opinion; as where the defendant said‡ "Two dyers are gone off, and for aught I know Harrison will be so too within this time twelvemonth."

So where defendant said to an upholsterer‖, "You are a soldier, I saw you in your red coat doing duty; your word is not to be taken;" the words were held actionable, it being a common practice, at the time they were spoken, for traders to protect themselves against their creditors by a counterfeit enlisting, a soldier having by act of parliament the privilege of freedom from arrest.

So where the words were of a carpenter§; "He is broken and run away, and will never return again;" after verdict for the plaintiff, it was urged in arrest of judgment, that the words were not actionable, for though broken, the plaintiff was as good a carpenter as ever; but it was answered by the court, that the credit which a man has in the world may be the means to support his skill, for he may not have an opportunity to shew his work.

* Holt R. 652.

† Cro. Car. 265.

‡ 10 Mod. 196, Harrison v. Thornborough.

‖ Arne v. Johnson, 10 Mod. 111.

§ Chapman v. Lamphire, 3 Mod. 155.

manship without those materials wherewith he is entrusted.

And where defendant said of a husbandman*, "He owes more than he is worth; he is run away:" the words were held actionable, though it was objected that it should not only appear that the plaintiff had a trade, but that he got his living by it.

And next, the words are actionable when they throw discredit upon the particular commodity in which the party deals.

Thus, to say of a trader†, "He hath nothing but rotten goods in his shop," is actionable; though it was said in the case referred to, that had the words been "he hath rotten goods in his shop," they would not have supported the action, and that the slander consisted in saying that he had nothing but rotten goods in his shop.

So to tax a bookseller falsely‡ with having published an absurd poem, is actionable, the evident tendency of the imputation being to injure him in his business.

So where the defendant said of the plaintiff, who was an innkeeper‖, "Deal not with Southam, for he is broken, and there is neither entertainment for man nor horse."

* Dobson v. Thorstone, 3 Mod. 112.

† Cro. Car. 570.

‡ Tabart v. Tipper, 1 Camp. N. P. 350.

‖ 3 Salk. 326.

So a *false and malicious* account* of the performance at a place of public amusement will support an action.

So where the defendant, who was printer of a newspaper, called the Oracle, published the following paragraph concerning the True Briton newspaper, of which the plaintiff was proprietor:

"*Times* v. *True Briton*†.

"In a morning paper of yesterday was given the following character of the True Briton:—that 'It was the most vulgar, ignorant, and scurrilous journal ever published in Great Britain.' To the above assertion we assent, and to this account we add, that the first proprietors abandoned it, and that it is the lowest now in circulation, and we submit the fact to the consideration of advertisers."

It was held by Lord Kenyon at *Nisi Prius*, that the latter words of the paragraph, as affecting the sale of the paper and the profits made by advertising, were actionable.

Where the plaintiff was a butcher‡, and brought his action for the words taxing him with having exposed to sale the flesh of a cow which died in calving, it was held after verdict, that the words were not actionable, even though special damage was laid and proved. This case seems, however,

* Dibdin v. Swan and Bostock, 1 Esp. 27.

† Heriot v. Stewart, 1 Esp. 437.

‡ Tassan v. Rogers, 2 Salk. 693.

to be very loosely reported, and is not supported by either analogy or principle.

Unless words affecting the plaintiff's means of livelihood fall within one of the foregoing descriptions, it may be concluded that they are not actionable.

The defendant said of the plaintiff, who taught girls to dance, "that she was an hermaphrodite*," and it was held that the words were not actionable, and that it was no scandal to her profession to say that she was an hermaphrodite, because men usually teach young women to dance.

* 3 Salk. 397.

CHAPTER IV.

Where the Words tend to the Party's Disinherison or affect his Title to Land.

WORDS falling within this division either affect the probability of the plaintiff's succeeding to an estate in future, or impeach a title which has already accrued.

Instances of the former class, where damages have been allowed to be recovered on account of the manifest tendency of the imputation to defeat the plaintiff's expectations, are exceedingly rare, and seem to have been confined to words impeaching the legitimacy of the birth of an heir apparent.

The defendant* said to the plaintiff, who was heir apparent to his father and uncle, "Thou art a bastard." After verdict for the plaintiff, the court, on motion in arrest of judgment, held that the action was maintainable, since by reason of the words the plaintiff might be in disgrace with his father and his uncle, and they conceiving a

* Humphreys v. Stanfield, Cro. Car. 469. Jo. 388. Godb. 451.

jealousy of him touching the same, might possibly disinherit him, and that though they eventually should not, yet that the action well lay for the damage which might come; and the cases of Vaughan v. Leigh, and of Banister v. Banister*, were cited by Jones, J. as in point.

In the first of these cases† the plaintiff shewed that land had been given in tail to his grandfather, and that his father had divers sons, whereof he was the youngest, and his eldest brothers living. That a certain person offered to buy the land, and was willing to give him such a sum of money for his title, and by reason of the words refused to give him any thing. After judgment for the plaintiff in the Exchequer, it was assigned for error, that it appeared by the plaintiff's own shewing that he had not any present title, and therefore no cause of action. But the two Chief Justices conceived that although he had not any present title, it appeared that he had a possibility of inheriting the lands, and that being offered a sum of money to join in the assurance, although he had not any present title, yet by reason of the words he had a present damage, and in future might receive prejudice thereby in case he were to claim the lands by descent.

This case, though cited as an authority for the

* 4 Coke, 17.

† Cro. J. 215. by the name of Vaughan v. Ellis.

former decision, does not warrant it to the full extent, since in the latter a loss had actually accrued to the plaintiff in consequence of the words; in the former the supposed prejudice consisted in the probability that the expectation of the heir apparent would be defeated.

In the case of Turner v. Sterling*, it was said by the court "The law gives an action for but a possibility of damage, as an action lies for calling an heir apparent bastard."

In an earlier case† the court observed, "The word bastard is determinable by the Spiritual Court, but if the plaintiff add further words to entitle himself as heir, or shew some *possibility* of being heir, this shall make the same words calling him bastard to be actionable.

The decisions upon this point do not, however, appear to have been uniform; in the case of Turner v. Sterling‡ above cited, Vaughan, J. said "I take it not to be actionable to call a man a bastard whilst his father is alive, the books are cross in it; nay, if lands had descended, I doubt whether it would be actionable any more than to say one has no title to land."

The last express decision upon the point ap-

* 2 Vent. 26. Vaughan, J. dissent.

† 2 Buls. 90.

‡ 2 Vent. 26. See also 1 Roll. Abr. 37. pl. 18.

|| Cro. Car. 469.

pears to be that of Humphreys v. Stanfield above referred to.

Words impeaching the plaintiff's *present title* to lands, have in many of the older cases been deemed actionable without proof of special damage.

Thus, where a remainder man* brought an action against the defendant for saying that the tenant in tail had issue one D. who was then alive, it was held that the action was maintainable.

It appears, however†, from a numerous class of decisions, that no action can be supported for words affecting the present title of a plaintiff to an estate, without shewing that some special damage and inconvenience has resulted from them, as that he was prevented from selling or making some advantageous disposition of it: the particular nature of such specific prejudice will be hereafter considered.

Although the numerous decisions upon the subject seem to leave no doubt that words reflecting upon a party's present title must, to give a right of action, be attended with special damage, it does not follow as an immediate and necessary consequence of this doctrine, that imputations immediately tending to defeat the prospects of an heir apparent, are not in themselves actionable, though it appears at first sight somewhat strange to say

* Bliss v. Stafford, Ow. 27. Mo. 188. Jenk. 247.

† Cro. Eliz. 196. 3 Keb. 153. 1 Vin. Ab. 553. Sty. 169. 176. Palm. 529. Snede v. Badley, 3 Buls. 74.

that it can be considered more prejudicial to impeach a title resting merely in expectancy, than to derogate from one already existing. There is, however, a plain line of distinction between the two cases. Where lands have already descended to the heir, to call him bastard, can work little prejudice; the false imputation cannot devest the estate, though it may involve the owner in litigation, for which special damage he is entitled to his remedy; but reflections of this nature, when cast upon an heir apparent, may produce consequences infinitely more serious, since they may induce the ancestor to disinherit the progeny which he conceives to be spurious.

In the former case the evil resulting from the slander can be but slight and temporary, in the latter it may prove utterly irremediable. The cases relating to words of the latter description are of considerable antiquity and of rare occurrence, and though they certainly carry the doctrine of presumptive and anticipative loss to a great extent, yet they seem to be supported and warranted both by general principles and by the peculiar exigency of the case.

CHAPTER V.

Where the Slander is propagated by Printing, Writing, or Signs.

BESIDES the communications which have been enumerated under the preceding divisions, many have been considered actionable, although unattended with special damage, on account of the mode in which they have been effected.

Observations upon this class of cases, relate, either to the reasons and authorities for this distinction, or to the extent to which the doctrine has been carried.

First, as to the *reasons* and *authorities* upon which the distinction is founded.

It has been said* that "slander in writing has at all times, and with good reason, been punished in a more exemplary manner than slanderous words, for as it has a greater tendency to provoke men to breaches of the peace, quarrels, and murders, it is of much more dangerous consequence to society. Words, which are frequently the effect of a sudden gust of passion, may soon be

* 6 Bac. Ab. 202, tit. Slander.

buried in oblivion; but slander which is committed to writing, besides that the author is actuated by more deliberate malice, is for the most part so lasting as to be scarcely ever forgiven."

And, that "*written slander hereby receives an aggravation, in that it is presumed to have been entered upon with coolness and deliberation, and to continue longer and propagate wider and farther than any other scandal."

These grounds relate to three distinct points:

1. The malicious intention of the author of the scandal.

2. The increased detriment to the object of the slander from its more extended circulation and duration.

3. The danger to the public peace.

First, It is clear that written slander evinces a higher degree of deliberation, and therefore of malice, than that which is merely oral; it may, however, be doubted whether that superior degree of malice constitutes the true principle upon which the distinction between oral and written slander is founded. The two essentials to an action are, as has already been observed, the loss to the plaintiff and the wrongful act of the defendant, the latter of which requisites in an action for slander, consists in the malicious motive by which the defendant was actuated in making the communica-

*4 Bac. Ab. 449. 5 Co. 125. Ld. Ray. 416. 12 Mod. 219.

tion. The *degree* of malice does not, however, seem in any case to form a subject of inquiry; its existence is indeed an essential requisite to the maintaining of an action, but if it exist at all, the legal condition is satisfied, and the only question which remains, relates to the loss sustained.

Secondly, The *increased detriment* to the party from the wider circulation and longer continuance of the slander, seems scarcely to warrant the distinction as to the legal quality of these two kinds of slander. It is true that ~~the prejudice from~~ slander, communicated by means of printing or writing, may be more widely diffused, may operate longer, than mere oral slander, and may also be considered as of more weight and authority, from the presumption, that, unless well founded, it would not have been circulated in so deliberate a mode: these, however, are circumstances which rather affect the quantum of damages, than furnish a distinction as to the relevancy of an action in such cases.

If it be supposed, for example's sake, that a report to a man's discredit, from the circumstance of its being propagated in a public print, obtains a circulation greater by ninety-nine times, than it would have done, had it been conveyed merely by word of mouth, and that the damage sustained is in proportion to the extent of circulation, the distinction between the two modes of communication would be a very good reason why

a jury should give one hundred pounds damages in the former case, and but one in the latter; but forms no ground for denying a remedy in the latter case altogether: if in the former case any legal damage has been sustained, a damage of the same nature has likewise been suffered in the latter, though but to one hundredth part of the amount, and therefore a proportional remedy is called for: if, on the other hand, no legal damage has been sustained in the latter case, it cannot be converted into such by a wider diffusion, which leaves its legal nature and essence wholly unaltered, and therefore if an actionable damage does not exist in the latter case, neither does it in the former. And this mode of reasoning seems equally to apply to the increased detriment arising from the longer operation of the slander, and the stronger impression it is calculated to make, from the mode in which it is communicated, since these circumstances alter not the nature of the mischief but its magnitude only.

It may be further observed, that when an individual's reputation is wounded, the scandal is for the most part confined to the neighbourhood, with which he is connected by habits of friendship or of business; within this limited sphere verbal detraction is easily promulgated, and if the calumny prevail there, it is of little importance to the sufferer what opinion may have been formed of him by strangers.

The prejudice, too, must depend in a great measure upon the intrinsic nature of the slander; it may be thought by many a much more serious matter to be believed capable of false swearing, where it can be done with impunity, or of secreting a will for the purpose of defrauding relations, than to be casually held up to ridicule on account of a natural deformity, or an habitual, but morally speaking, harmless eccentricity of manner.

Thirdly, The danger to be apprehended to the public peace does not appear to warrant the distinction in question, though it may strongly dictate the necessity of subjecting the authors of such publications to the correction of the magistracy.

A question, however, of this nature is decided much better by experience than by any arguments which mere theory can furnish; in the present instance, the antiquity of the distinction, and the frequent approbation which it has received from the most enlightened lawyers, constitute a very strong and convincing argument in favour of its practical utility.

The number of actual decisions founded upon the difference between oral and written slander is exceedingly small; the distinction itself, has however, been very frequently collaterally countenanced and recognised by most able and accomplished judges.

It appears to have been held in very early times,

that a libel* on the character of a private individual was punishable by way of indictment.

Sir Edward Coke, in his third Institute†, cites a record of the conviction of Adam de Ravensworth, who was indicted in the King's Bench, in the reign of Edw. III. for the making of a libel in the French tongue against Richard of Snowshall, calling him therein Roy de Raveners, &c. and adds, "so a libeller, or a publisher of libel, committeth a public offence and may be indicted thereof at Common Law."

This, indeed, was a criminal proceeding, and no instance of a civil action in case of libel appears till long after; it seems, however, to have been uniformly held‡, that where a party is indictable for a written publication, an action is also maintainable at the suit of the party injured.

In the case of Dr. Edwards v. Dr. Wooton‖ in the Star-chamber, it appeared that Dr. Wooton had written to Dr. Edwards a letter containing scandalous matter, to which he had subscribed his name, and that he had likewise published and dispersed a number of copies of the same letter. And it was resolved by the Lord Chancellor Egerton, the

* The term LIBEL, in the following pages, is used to signify any writings, pictures, or other signs, tending to injure the chater of an individual, or to produce public disorder.

† 74.

‡ Skinn. 123. 2 Wils. 204. 4 Com. Dig. tit. Libel. C. 3. 6 Bac. Ab. tit. Slander, 202. 3 Bl. Comm. 125. 2 Camp. R. 511.

‖ 12 Rep. 35.

two Chief Justices, and the whole court, that this was a subtle and dangerous kind of libel, inasmuch as the writing a private letter to another *without other publication*, would not support an *action on the case*, but that when published to others, to the *scandal of the plaintiff*, as it had oftentimes been adjudged, *an action lieth*. And it was said, that although the defendant had subscribed his name to the letter, yet since it contained scandalous matter, it was to be considered in law as amounting to a libel. From this case, though the contents of the letter in question do not appear, the opinion of the Lord Chancellor and the two Chief Justices may be collected to have been, that generally, scandalous matter published in writing was a ground of action.

Peacock* exhibited his bill against Sir George Raynal in the Star-chamber, for a libel written under these circumstances:

The plaintiff was heir general to Richard Peacock, who was of the age of 86 years, and had lands of inheritance to the value of £800. a year; the defendant, who had married the daughter of Sir Edward Peacock, who was a younger brother of Richard Peacock, wrote a letter to Richard Peacock, informing him, that the plaintiff was not the son of a Peacock, and was a haunter of taverns, and that divers women had followed him from London to the place of his dwelling, and that

* 4 Browl. 151.

he had desire to hear of the death of the said Richard, and that all the inheritance would not be sufficient to satisfy his debts, and many other matters concerning his reputation and credit. And it was agreed that this was a libel, and for that the defendant was fined to £200, and imprisonment, according to the course of the court; and the plaintiff let *loose to the Common Law for his recompence* for the damages which he had sustained.

In the case of King v. Sir Edward Lake*, the libel was contained in an answer to a petition preferred by the plaintiff to the House of Commons, and consisted of many general reflections upon the conduct of the plaintiff. After verdict for the plaintiff, it was moved in arrest of judgment, that the terms of the publication were too general to support an action; but it was said by Hale, Chief Baron, that "Although such general words *spoken once*, without *writing* or *publishing* them, would not be actionable, yet here they being written and published, which contains more malice than if they had been once spoken, they are actionable.

In the case of Sir J. Austen v. Col. Culpepper†, the defendant had forged an order of the Court of Chancery, containing many defamatory reflections upon the plaintiff, and at the bottom had drawn the form of a pillory, and subscribed to it the

* Hardr. 470. † Skinner, 123. 2 Show. 314.

words "For Sir J. Austen and his witnesses by him suborned."

It was contended that the action was not maintainable, since no certain slander was imputed by the words, and that if the words would not support the action, the representation could not, since it was not to be inferred that the parties were perjured, and that though for setting up horns, &c. for the purpose of ridicule, an indictment lay, yet that no action was maintainable; but the court held that *an action* in such cases was maintainable, as well as an *indictment*, and referred to the case of Col. King v. Lake*, where the plaintiff had judgment in the Exchequer. And the court added, that to *say* of any one that he is a dishonest man, would not be actionable; but that to *publish* it or *put it on the posts* would be actionable, and the plaintiff had judgment.

In the case of Cropp v. Tilney†, it was said by Holt, C. J. "Scandalous matter is not necessary to make a libel, it is enough if the defendant induce an ill opinion to be had of the plaintiff, or make him contemptible and ridiculous; as for instance, an action was brought by the husband for riding Skimmington‡ and adjudged that it lay, because it made him ridiculous and exposed him."

* Hardr. 470.

† 3 Salk. 226.

‡ Mason v. Jennings, Sir T. Ray. 49. contra. Sed vid. 2 Show. 314.

In Bradley v. Methwyn*, which was an action on the case for a libel, Lord Hardwicke, C. J. observed, that "The present case is not for words, but for a libel, in which the rule is different, for some words may be actionable or prosecuted by way of indictment, which would not be so if spoken only, for the crime in a libel does not arise merely from the scandal, but from the tendency which it has to occasion a breach of the peace, by making the scandal more public and lasting and spreading it abroad, which was determined in this court in the case of King v. Griffin." Hil. 7 G. II.

In Villers v. Monsley†, the libel charged the plaintiff with having the itch: upon motion in arrest of judgment, Wilmot, C. J. observed, "If any man deliberately, or maliciously, publish any thing in writing concerning another which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher."

Bathurst, J. "I wish this matter was thoroughly gone into and more solemnly determined; however, I have no doubt at present, but that the writing or publishing any thing which renders a man ridiculous is actionable. I repeat it, I wish

* Selwyn's Ni. Pri. 1st Ed. 925. n. 2. B. R. M. 10 G. II. MSS.

† 2 Wils. 403.

there were some more solemn determination that the writing and publishing any thing which tends to make a man ridiculous or infamous ought to be punished."

Gould, J. "What my brother Bathurst has said is very material; there is a distinction between libels and words: a libel is punishable both criminally and by action, when speaking the words would not be punishable either way; for speaking the words rogue and rascal of any one, an action will not lie, but if those words were written and published of any one, I doubt not an action will lie. I think the publishing any thing of a man that renders him ridiculous, is a libel and actionable." And judgment was given for the plaintiff by the whole court, without granting any rule to shew cause.

In J. Anson v. Stuart* the action was brought in the Common Pleas, for publishing in the Morning Post, that "The plaintiff was at the head of a gang of swindlers, a common informer, and had been guilty of deceiving and defrauding divers persons with whom he had dealings and transactions." The plaintiff demurred specially on account of the generality of the defendant's plea, and judgment having been given for the defendant below, the plaintiff carried the matter by writ of error into the Court of King's Bench, where the same causes

* 1 T. R. 748.

were assigned for error, which before had been alleged as grounds of special demurrer.

The defendant further contended, that the declaration was insufficient, since the words "common informer" were not actionable, and the term "swindler" was not a legal term, of which the law could take notice. But Buller, J. observed, "The objection afterwards taken to the declaration is, that the term 'swindler' is too general, and cannot be legally understood, but Mr. J. Aston formerly held otherwise, for he said that the term swindling was in general use, and that the court could not say they were ignorant of it. But at all events we cannot say upon this record, that we do not understand the import of it, for it is explained to be 'defrauding divers persons.' The declaration contains as libellous a charge as can be well imagined."

This case cannot be considered as decided upon the distinction in question, since it seems to have been the opinion of Mr. J. Buller, that the term "swindler," as explained by the subsequent words, was actionable without reference to the mode of publication*.

Zenobio brought an action against Axtell† for publishing in the newspaper, called the Courier de

* In Savile v. Jardine, 2 H. Bl. 531. it was held that the term "swindler" was not actionable.

† 6 T. R. 162.

Londres, the following paragraph—" The late famous Bishop of Autun, to the great satisfaction of all honest men, has just received an order to quit England: the same compliment has been paid to an adventurer, a great gambler, who calls himself the Count Zenobio." After verdict for the plaintiff, the defendant contended, in arrest of judgment, that the publication was not libellous; since, however, there was another objection, which was fatal to the declaration, the court did not give any opinion as to the actionable quality of the words.

In Bell v, Stone*, the defendant wrote the following letter concerning the plaintiff, who was a land-surveyor, to one N. B. to whom the plaintiff owed a large sum of money:

" After the communication I had with your son in your absence, I but little thought you would have been made the dupe of one of the most infernal villains that ever disgraced human nature; but I suppose you were deceived by those whom you thought well of, and whom he will deceive if they will give him an opportunity; I am told they are respectable, and how they can be connected with him is the most astonishing thing to me. Mr. H. writes me you called upon him (meaning the plaintiff) on the subject of your account, for which the villain gave you his note at five

* 1 Bos. & Pul. 331.

months." Special damage was laid in the declaration, but none being proved at the trial, the learned Judge who tried the cause was of opinion that the letter, unsupported by special damage, was not actionable, and directed a verdict for the defendant. The counsel for the plaintiff, however, contending that the letter itself was actionable, it was left to the jury to say what damages they would give, supposing the plaintiff entitled to recover, and they answered, one shilling. A rule was obtained to shew cause why the verdict for the defendant should not be set aside, and a verdict entered for the plaintiff, on the count containing the letter, for one shilling, on the ground that though the words in that count might not be actionable if only spoken, yet that being committed to writing they were so.

Serj. Le Blanc was to have shewn cause against the rule, but the court expressing themselves clearly of opinion, that *any words written and published, throwing contumely on the party, were actionable*, the learned counsel declined arguing the point, and the rule was made absolute.

After these authorities it can scarcely be considered as matter of doubt, whether the distinction between verbal and written slander is a legal and subsisting distinction; in some of the cases cited, the point was expressly determined, and in the others the language of the judges has been constantly the same, recognising the doctrine in a variety of col-

lateral shapes. The very scarcity of express decisions upon this subject, may perhaps be attributed to the absence of doubt concerning it, and may, therefore, when coupled with the frequent approbation which the distinction has met with from the courts, be considered as very strong evidence in support of its early establishment and subsequent prevalence.

It is probable that in early times there was no difference, as far as concerned civil actions, between verbal and written slander; no distinction is made between them either in the statutes of Scandalum Magnatum or in the older cases relating to subject, and the general rule appears once to have been, that all words were actionable which tended* to take away a man's reputation, without regard to the mode of communication. It has already been seen that this rule was soon found too comprehensive, as applied to actions for oral slander, and that the judges accordingly felt themselves under the necessity of prescribing some restraints, and laying down those rules of limitation from time to time, which are to be found in the preceding chapters. It may not, however, be unfair to suppose that the inconvenience, and therefore the necessity of limitation, did not extend itself to the case of written slander, in respect of

* 1 Bulst. 40. Smale v. Hammon. Holt, R. 654. 6 Mod. 24. Ld. Ray. 959. 8 Mod. 24.

which the old rule, therefore, remained unaltered. The number of actions brought for the publication of written slander, must, in early times, have been comparatively small, on account of the limited number of those whose education enabled them so to offend; it is, therefore, improbable that the courts would deem it necessary to impose new restraints respecting them, though the overwhelming increase of actions for trivial words spoken might render their limitation unavoidable.

Perhaps this conjecture as to the origin of the distinction in question, may receive some support and colour from the consideration, that the statute* limiting the amount of costs (in actions for slanderous words) to the quantum of damages, where they do not amount to 40 shillings, and which was passed for the purpose of repressing actions brought for trivial slander†, does not extend to written slander, a circumstance which strongly tends to shew that actions for injuries of the latter description, did not call for the interference, or fall within the contemplation of the legislature.

The authorities already cited leave little to be said in relation to *the extent of the action* for slander communicated by means of writing, printing, pictures, or other signs.

* 21 J. 1. c. 16.

† Tidd's Practice, 4th Ed. 861. Hall v. Warner, Trin. 24 G. III.

According to Lord Coke*, every infamous libel is either *in writing*, or *without writing*. A scandalous libel in writing is, when an epigram, rhime, or other writing, is composed or published to the scandal or contumely of another, by which his fame or dignity may be prejudiced.

The libel *without writing* may be,

1st. By pictures, as to paint the party in any shameful or ignominious manner.

2ndly. By signs, as to fix a gallows, or other reproachful or ignominious signs, at the party's door, or elsewhere.

Upon the whole, it may be collected, that any writings, pictures, or signs, which derogate from the character of an individual, by imputing to him either bad actions or vicious principles, or which diminish his respectability and abridge his comforts, by exposing him to disgrace and ridicule, are actionable, without proof of special damage; in short, that an action lies for any *false, malicious, and* PERSONAL *imputation, effected by such means, and tending to alter the party's situation in society for the worse.*

This rule, though apparently very wide and comprehensive, cannot be considered as more extensive than the justice of the case demands. No man, abstractedly, has a right to lessen the comforts or enjoyments of another; and when he does it deliberately, wantonly, and maliciously, it would be

* 5 Rep. 125.

an insult to common sense to contend, that he is not bound, upon the plainest grounds of policy and justice, to make compensation for the mischief so occasioned: and no inconvenience can result from the extent of the rule: it must be recollected, that the only question at present under consideration is, the nature of the damage which must have been sustained to render words actionable: this damage is, however, but one of two essential requisites for the supporting an action. To render the right complete, such damage must have been occasioned, as will afterwards be seen, by the malicious act of the defendant. This further requisite, of *malice*, precludes litigation in all cases where the party has acted in the discharge of any legal or moral duty, or in the fair and conscientious performance of his part in any transaction arising out of the ordinary business of life, without a deviation for malevolent purposes, and confines the action to those instances in which the mischief is attributable to mere malice of heart, or to a wanton and guilty disregard of the feelings and interests of others.

It is said, by the learned author of the Commentaries, that*, "as to signs or pictures, it seems necessary always to shew, by proper innuendos and averments of the defendant's meaning, the import and application of the scandal, and that *some special damage has followed*: otherwise it cannot appear that such libel by pictures, was understood

* 3 Bl. Com. 126.

to be levelled at the plaintiff, or that it was attended with any actionable consequences. It seems, however, very difficult to conceive any sound distinction between written and painted libels.

A man may be as successfully exposed to ridicule by a caricature painting, as by any written misrepresentation; and the object of the defendant as clearly manifested in the latter case, as the former. The difficulty, indeed, of proving the plaintiff to be the person aimed at, may, in some instances, be greater in the latter case; but when the doubt as to the defendant's application of the calumny has been overcome, there seems to be no room for further distinction.

The pencil of the caricaturist is frequently an instrument of ridicule more powerful than the press; and it is not easy to conceive an imputation which an ingenious artist would not be able successfully to communicate to minds of even the meanest capacity. A picture is the image or likeness of the scene itself: words written or printed are merely symbols, which, by virtue of a previous compact and understanding on the subject, are the representatives of the ideas which they communicate: but in legal consideration, the only question is, whether any and which of these modes is capable of conveying that meaning which is detrimental to the plaintiff? If, in fact, they are equally capable of so doing, equally distributable, and equally du-

rable,—in short, equally mischievous in every respect, they cannot be considered as distinguishable, for any legal purpose, upon any principle of reason and good sense: And no such distinction is to be found in the reports. It was expressly held by Holt C. J. that "In case upon libel it is sufficient if the matter be reflecting*; as to paint a man in any disgraceful situation."

The plaintiff† brought an action of trespass against the defendant for destroying a picture of the plaintiff's. Upon the trial it appeared that the picture in question, entitled La Belle et La Bête, was a caricature representation of a gentleman and his wife, who was sister to the defendant, and that it had been publicly exhibited for money till the defendant cut it in pieces. The plaintiff insisted that he was entitled to the full value of the picture, together with a compensation for the loss of the exhibition. The defendant contended that it was a public nuisance, which every one had a right to abate by destroying the picture.

Lord Ellenborough C. J. "The only plea upon the record being the general issue of 'not guilty,' it is unnecessary to consider whether the destruction of this picture might or might not have been justified. If it was a libel upon the persons introduced into it, the law cannot consider it valuable as a pic-

* 11 Mod. 99. See also 2 Hawk. Pl. C. c. 73. s. 2. 5 Co. 125. Skinner, 123. 3 Keb. 378.

† Du Bost v. Beresford, 2 Camp. Rep. 511.

ture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition; and the plaintiff was both *civilly* and *criminally* liable for having exhibited it."

There remains a class of communications differing from any of those adverted to, and which though accompanied with circumstances of cooler deliberation and more settled purpose than words merely spoken, are not calculated to produce such lasting and widely extended consequences as those effected by writings or pictures.

The vulgar custom of riding Skimmington, and the practice of carrying or burning the effigies of persons intended to be held out as public objects of disgrace and ridicule, are instances of this description. The impressions made by such proceedings are naturally more lasting, and are likely to produce a greater degree of mischief than words merely spoken, and yet the calumny is not so durable as if it had been conveyed in print or in writing. Since, however, these are means by which a man may be rendered, in many instances, contemptible and ridiculous, and in others may be exposed to the serious effects of popular indignation and resentment,—since the act of the defendant is more studied and deliberate, and the consequences more mischievous than those of mere verbal slanders, it is probable that such representations would be deemed actionable, as falling within the the same consideration with the cases which have formed the subject of the present chapter.

CHAPTER VI.

Of Scandalum Magnatum.

WORDS spoken in derogation of a peer or judge, or other great officer of the realm, are usually called *Scandalum Magnatum;* and though they be such as would not be actionable when spoken of a private person, yet when applied to persons of high rank and dignity, they constitute a more heinous injury, which is redressed by an action on the case, founded on many ancient statutes, as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on the behalf of the party to recover damages* for the injury sustained.

Under this division will be considered,

1. The grounds of the action.

2. The parties entitled to maintain it.

3. The nature of the words which will support it.

The statute † 3 Ed. 1. c. 34. after premising that "Forasmuch as there have been oftentimes found in the country devisors of tales whereby discord, or occasion of discord hath many times arisen between the king and his people, or great men of the realm,"

* 3 Blac. Comm. 123.

† For the history of these statutes, see 2 Mod. 152. Barrington on the Penal Statutes. 3 Reeves. Hist. and 1 Parl. Hist.

enacts, "that from henceforth none be so hardy to tell or publish any *false news* or tales, whereby discord, or occasion of discord, or slander, may grow between the king and his people or the great men of the realm; and he that doth so, shall be taken and kept in, until he hath brought him into court which was the first author of the tale."

By 2 R. 2. st. 1. c. 5. "Of devisors of *false news* and of *horrible and false lies*, of prelates, dukes, earls, barons, and other nobles and great men of the realm; and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or of the other, and of other great officers of the realm, of things which by the said prelates, lords, nobles, and officers aforesaid, were never spoken, done, nor thought, in great slander of the said prelates, lords, nobles, and officers, whereby debates and discords might arise betwixt the said lords, or between the lords and commons (which God forbid), and whereof great peril and mischief might come to all the realm, and quick subversion and destruction of the said realm, if due remedy be not provided. It is straitly defended upon grievous pain, for to eschew the said damages and perils, that from henceforth none be so hardy to devise, speak, or to tell any false news, lies, or other such false things, of prelates, lords, and of others aforesaid, whereof discord or any slander might rise within the said realm; and he that doth the same shall incur and have the pain another time ordained thereof by the statute of West-

minster the first, which will, that he be taken and imprisoned till he have found him of whom the word was moved."

Also by the 12 R. 2. c. 11.—"Item. Whereas it is contained as well in the statute of Westminster the first, as the statute made at Gloucester, the second year of the reign of our lord the king that now is, that none be so hardy to invent, to say, or or to tell any false news, lies, or such other false things, of the prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, and steward of the king's house, the justices of the one bench or of the other, and other great officers of the realm; and he that doth so shall be taken and imprisoned till he hath found him of whom the speech shall be moved. It is accorded and agreed in this parliament, that when any such is taken and imprisoned, and cannot find him by whom the speech be moved, as before is said, that he be punished by the advice of the council, notwithstanding the said statutes."

It does not appear very clear, whether, before these statutes, any words would be held actionable when applied to a peer or other person of high rank and dignity which would not have been deemed so in the case of a private person*.

In the case of Lord Townsend v. Dr. Hughes†, the words were, "He is an unworthy man, and

* See Buller L. N. P. 4. and 12 Co. 133.

† 2 Mod. 150.

acts against law and reason;" and Scroggs and Atkins justices were of opinion, that by the Common Law no action would lie though such words were spoken of a peer; but North C. J. considered the words as actionable at Common Law; and held, that no words would be actionable under the statute which were not so at Common Law.

Whether such a distinction prevailed or not at Common Law, is at present a matter of curiosity rather than of practical importance, since it has been established by a long train of decisions, that the distinction, if not created, has at all events been considered as warranted, by the operation of the statutes alluded to.

Upon these it has been held, that a remedy by action has been given to the great men of the realm, entitling them to a compensation in damages for injurious reflections upon their character, though the statutes themselves do not in express terms profess to bestow such a remedy. And this doctrine is founded upon the general rule, that whenever* a party is prejudiced by the doing of that which is prohibited by statute, he is entitled to damages. It is a remarkable circumstance, that from the time of passing the st. 12 Rich. 2. no civil action appears from the reports to have been founded upon it before the † thirteenth year of Henry the Seventh, comprising an interval of more than a century.

* Keil. 26.

† Ld. Townsend v. Dr. Hughes, 2 Mod. 160. 10 Co. 75.

2. Next as to the parties entitled to maintain this action.

Since the statute 2 R. 2. st. 1. c. 5. commences with an enumeration of persons inferior in rank to the king, it has been held, that the latter is not included* within the general words, "and great men of the realm." But † that he is included within the first of Westminster.

The action has been adjudged to extend to orders of nobility created since the making of these statutes; so that although the stat. 2 R. 2. specifically mentions Dukes, Earls, and Barons only, a Viscount ‡ has been considered as entitled to the action, though the title is of much || later creation.

It has been said§, that a female, noble by birth, is not within the statute; but it seems difficult to say upon what principle a peeress is excluded from the benefit of this statutable protection.

Since the words derive their actionable essence from their application to the dignitaries specified in the statute, it must appear that the plaintiff held his rank at the time the words were published ¶.

By the act of union ** with Scotland, is enacted, that all peers of Scotland shall also be peers of Great Britain, and enjoy all privileges as fully as

* Cromp. Jur. 19. 35. 6 Bac. Ab. 97. 12 Co. 133.

† 12 Rep. 133.

‡ Cro. Car. 136. Palm. 165.

|| John Beaumont, the first Viscount, was created such 18 H. 6.

§ Crom. Jur. 35. 6 Bac. Ab. 97.

¶ Vent. 60.

** 5 Ann. c. 8. Art. 23.

peers of England, except of sitting in the house of lords and the privileges depending thereon. Under this clause it has been determined, that a peer of Scotland is one of the magnates* to whom this statute extends; and it was said, that though it had been customary in such action to aver that the plaintiff had a *vote and seat in parliament*, such an averment was superfluous.

It seems that the action is maintainable by a Baron† of the Exchequer, though the statute mentions only Justices of the one bench or the other.

3. What words will support the action.

The grounds of the action and the effect of these statutes, underwent much learned discussion in the case of Lord Townsend v. Dr. Hughes‡, which has been already referred to. The action was there brought for speaking the words, "He is an unworthy man, and acts against law and reason." Upon, not guilty pleaded, the cause was tried, and the jury gave 4000*l.* damages. Upon motion in arrest of judgment, Serjeant Maynard, for the defendant, allowed that it was too late to contend that an action to recover damages was not maintainable under the statutes of Scandalum Magnatum, upon the principle before mentioned, that where a statute prohibits a thing prejudicial to another, the person

* Lord Falkland v. Phipps, Comyn. Rep. 439. 1 Vin. Ab. 549. pl. 22.

† Vid. Pal. 565. 12 Co. 132.

‡ 2 Mod. 150.

prejudiced is entitled to recover damages; but he insisted that the words were not within the meaning of the acts; because, the term *unworthy* imported no particular crime,—that it was merely a term of comparison, and that instances of unworthiness might be alleged which would not support an action; but that, if the plaintiff had been compared to any base and unworthy thing, the words would have been actionable: as in the Marquis* of Dorchester's case, of whom the defendant said, "There is no more value in him than in a dog." That to say a man acts against law and reason, is no scandal; a man who buries one of his family in linen acts against law, but that, if the penalty be satisfied, the law is so too. That no instance was given in which the plaintiff had acted against law, and therefore that the case was unlike the Duke† of Buckingham's, who brought an action for the words, "You are used to do things against law, and put cattle into a castle where they cannot be replevied;" for in that case, not only an usage was charged upon him, but a particular instance of oppression. That the words in question were uncivil, but not actionable,—that there were many authorities which shewed a peer not entitled to an action for every trivial and slight expression spoken of him. As to say of a peer, "He keeps none but

* Crom. Jur. of Courts.

† Hil. 16 C. 2. Roll. 1269.

rogues and rascals about* him, like himself," which words, in the opinion of Yelverton and Fleming, Justices, were not actionable.

That the statute was made to punish those who devised "false news, and horrible and false lies of any peer," &c. whereby discords might arise between the lords and commons, and great peril and mischief to the realm, and quick subversion thereof. But that it could not be contended under the fair construction and intent of the act, that if one should say, "Such a peer is an unworthy man," the kingdom would be presently in a flame, and turned into a state of confusion and civil war; or, that the state would be endangered by saying of a peer, "he acts against the law." That the plaintiff was placed in no hazard by the words, nor in any wise damnified; he was not touched in his loyalty as a peer, nor in danger of his life as a subject; he was not thereby subjected to any corporeal or pecuniary punishment, nor charged with any breach of oath, nor any miscarriage in office.

It was answered by Pemberton, Serj. that it was the end and object of these statutes to give a remedy against all *provoking* and *vilifying* words which were used before to exasperate the peers, and to make them betake themselves to arms, and to carve out their own remedy by the sword. That since the design of the statute was to prevent such

* Earl of Lincoln's case, Cro. J. 196.

practices, not only those words were to be considered as falling within their scope, which imported *great scandal*, and for which an action lay at the common law, but even such things as savoured of any contempt of their persons, and such as brought them into disgrace with the commons, whereby they took occasion of prosecution and revenge. And he cited Lord Cromwell's case *, where the words were, "You like those who maintain sedition." The Earl of Lincoln's case, "My lord is a base Earl, and a paltry Earl, and keepeth none but rogues and rascals like himself."

The Duke of Buckingham's case †, "He has no more conscience than a dog."

The Marquis of Dorchester's case, "He is no more to be valued than the black dog that lies there."

All which words had been held actionable, though not touching the persons in any thing concerning the government, nor charging them with any crime, but in point of dignity and honour.

Scroggs, J. observed, that "the words here laid are not so bad as the defendant might have spoken, but they are so bad that an action will lie for them; and though they are *general*, many cases may be put of general words which import a crime, and which have been adjudged actionable."

* 4 Co. 13. Cro. J. 196.

† Hil. 16. c. 2. Roll. 1269.

In the Earl of Leicester's case, "He is an oppressor," were held actionable.

And in Lord Winchester's case, "He kept me in prison, till I gave him a release," were deemed actionable, because the plain inference from them is, that he was an oppressor.

And so, in Lord Abergavenny's case, "He sent for me, and put me in Little Ease." It appears by all these cases, that the Judges have always construed in favour of these actions; and this has been done in all probability to prevent those dangers which otherwise might ensue if the lords should take revenge themselves."

Atkyns, J. held, that under the construction of the statute, the words to be actionable must be *horrible* as well as *false*, and such as were punishable in the high commission court, which were enormous crimes. That the statute did not extend to words of a small and trivial nature, nor to all words which were actionable, but only to such as were of a greater magnitude, such by which discord might arise between the lords and commons to the great peril of the realm, and such which are *great slanders* and *horrible lies*, which are words purposely put into this statute for the aggravation and distinction of the crime; and, therefore, such words as were actionable at the common law might not be so within this statute, because not horrible great scandals. The learned Judge also observed,

that in the Duke of Buckingham's case *, (which was the second which appears to have been determined in an action on the statute,) where the defendant said, "You have no more conscience than a dog;" and in the case of Lord Abergavenny v. Cartwright, "You care not how you come by goods," the words charged the plaintiff with particular matter, and did not rest barely upon opinion.

That in the case of the Bishop of Norwich †, the words, "You have writ to me that which is against the word of God, and to the maintenance of superstition," were held actionable, because they refer to his function, and greatly defame him. That in the case of Lord Mordant v. Bridges ‡, the words "My Lord Mordant did know that Prude robbed Shotbolt, and bade me compound with Shotbolt for the same; and said, he would see me satisfied for the same, though it cost him an hundred pounds, which I did for him, being my master, otherwise the evidence I could have given would have hanged Prude;" were held actionable; and that both in this, and in all the other cases which had been mentioned on the statute, and where judgment had been given for the plaintiff, the words had always charged him with some particular fact, and were positive and certain; but that where they

* 4 Hen. 8. Cromp. Jur. 13.

† Cro. Eliz. 1.

‡ Cro. Eliz. 67.

were doubtful and general, and signified only the opinion of the defendant, they were not actionable. That the words in the case at bar neither related to the plaintiff as a peer, nor as a lord lieutenant, and charged him with no particular crime; and that if the laws were expounded to rack people for words, instead of remedying one mischief, many would be introduced; for in such case they would be made snares to men. He farther said, that it was fit the law should be settled by some rule, because it is a wretched condition for people to live under such circumstances as not to know how to demean themselves towards a peer; and that since no limits had before been prescribed, it was fit there should be some then, and that the court should go by the same rules in the case of a peer as in that of a common person; that is, not to construe the words actionable, without some particular crime charged upon the plaintiff, or an allegation of special damage.

North, C. J. and Wyndham, J. agreed with Scroggs, the former being of opinion, that all words reflecting upon a peer, as he is the king's counsellor, or as he is a man of honour and dignity, are actionable at the common law. That in many cases where a man should express his particular disesteem, an action would not lie, as if he had said, "I care not for such a lord," but that words of general opinion and disesteem were actionable, as

was held in the Marquis of Dorchester's case *; and, by the opinion of North, C. J. and Wyndham and Scroggs, Justices, judgment was given for the plaintiff.

And in the case of the Earl of Pembroke v. Staniel †, the words were, "The Earl of Pembroke is of so little esteem in the country, that no man of reputation hath any esteem for him; he is a pitiful fellow, and no man will take his word for two-pence, and no man of reputation values him more than I do the dirt under my feet;" and they were held actionable under the statute, though they would not have been so in the case of a private person.

And in the case of Lord Falkland v. Phipps ‡, the terms villain, villainous rogue, scrub, and scoundrel, were held actionable.

From these cases it appears, that *general expressions of contempt and disesteem, tending to degrade and vilify the characters of peers and great officers of the realm*, are actionable, as well as those which impeach their loyalty, or impute the commission of any criminal and disgraceful fact. Where words are spoken of a peer, which would be actionable as spoken of a private person, the plaintiff

* 1 Sid. 293.

† Freem. Rep. 49. 1 Vin. Abr. 549.

‡ Comyn's Rep. 439.

has it at his option * to proceed either upon the statute, or in the usual form of action.

The incidents peculiar to Scandalum Magnatum, as relating to the process, pleading, justification, &c. will be considered in common with the corresponding ones belonging to the proceeding at common law.

* Per Twisden. Freem. Rep. 49. pl. 58.

CHAPTER VII.

Of Special Damage.

WHENEVER damage arises in consequence of a false imputation, wrongfully published, an action is maintainable on the ground of such specific damage.

Under this division two questions occur:

1. What, in legal contemplation, amounts to an actionable damage?

2. How must such damage be connected with the slander, to constitute a ground of action?

1. *What, in legal contemplation, amounts to an actionable damage.*

The defendants act affects either rights already acquired, or prevents the acquisition of some further benefit or advantage.

Where the plaintiff has been wrongfully charged with the commission of some crime, if the imputation rest as a bare charge, not officially made in the usual course of a criminal proceeding, the party, it seems, has a right to consider the expense and labour to which he is put for the purpose of manifesting his innocence as special damage.

As where the plaintiff, in consequence of an insinuation that he was guilty of murder, was obliged to have an inquest taken on the body of the deceased *.

But if the defendant proceed according to the usual forms of criminal prosecution, though the plaintiff is entitled to recover damages for the scandal, vexation, and expense, brought upon him by an unfounded and malicious accusation, he must proceed either by an action of conspiracy or by a special action on the case, founded upon the criminal proceeding itself, and cannot recover (as will afterwards be seen) in a common action for any scandalous matter published in the course of such a prosecution †.

Where a party is prevented from selling, exchanging, or making any advantageous disposition of lands, or other property, in consequence of the impertinent interference of the defendant, he may maintain an action for the inconvenience which he has suffered; but damage must be shewn; and the mere apprehension ‡, that in consequence of the slander, the plaintiff's title may be drawn in question, will not support an action.

And it is not sufficient to shew generally that the plaintiff intended to sell to any one that would

* Per Lord Mansfield. Peake v. Oldham. Cowp. 277.

† 3 Bl. Com. 126. 10 Mod. 210. 219, 220. Str. 691.

‡ Cro. Eliz. 197. 1 Vin. Ab. 550. pl. 6. Yelv. 80. Cro. J. 642. contra.

buy, but he must prove that he was in treaty to sell them to some specific person *. Neither will it suffice to shew, that the value of the lands was lessened in people's opinions, but proof must be given of damage actually sustained. Where the alleged loss consists in the prevention of the sale of lands, it must appear that the words directly tended to defeat the plaintiff's title †.

In Sir W. Gerrard v. Dickenson ‡, it was said by Wray, C. J. that in all cases where one doth entitle a stranger, it is not actionable, except it be shewn that some damage comes to the proprietor by it, viz. that he cannot let it or sell it, &c.

The defendant said§, "M. has mortgaged all his lands for £100. and has no power to sell or let the same." And, because no special damage nor particular colloquium was laid of a treaty to sell them to any person certain, but only in general that he intended to sell it to any one that would buy, which is too general, judgment was stayed.

In Elborow v. Allen ||, the action was brought for the words, "He is but a bastard," spoken of the plaintiff, who had lands by descent; by means of

* Manning v. Avery. 3 Keb. 153.

† Burr. 2622.

‡ Cro. Eliz. 196.

§ Manning v. Avery, 3 Keb. 153. 1 Vin. Ab. 553. pl. 21. Sty. 169. 176. Palm. 529.

|| Cro. J. 642.

which he was put to great expense to defend his title. And two of the justices, against the opinion of Doderidge, J. decided, that the words were actionable, the plaintiff having averred in his declaration that he was put to a great charge to defend his inheritance.

But it has been held, that to institute a civil suit, though there be no good ground for it, is not actionable, because it is a claim of right for which the plaintiff has found pledges, is amerciable pro falso clamore, and is liable to costs, and therefore that no action lies, unless the defendant be maliciously sued *, with intent to imprison him for want of bail.

And upon the same grounds, it should seem, that the plaintiff is precluded from recovering from the person who spoke the words which brought the title into litigation, since, in contemplation of law, he has been already satisfied for the false claim.

And next, where the plaintiff is prevented from acquiring some benefit or advantage.

In general, where the plaintiff is *hindered*, by *the mere wrongful act* of the defendant, from succeeding to any *preferment*, *benefit*, *or advantage* whatever, he may maintain an action for the special damage.

* See Saville v. Roberts. 1 Salk. 13. 4 Co. 9 Co. 56, b. 1 Roll. Abr. 112.

As, if a patron * intend to present a divine to a benefice, and the defendant say of him, "He is an heretick, or a bastard;" for which reason the patron refuses to present him, and he loses his preferment, an action is maintainable.

So, if the defendant say of a candidate for an office, that he is an ignorant man and unfit for the place, by means of which he ~~loses~~ it, an action lies †.

x is prevented from succeeding to

So, where a servant or bailiff is prevented from getting a place ‡.

Loss of marriage seems to have been always considered as a temporal damage §, although the words themselves have imputed matter of mere spiritual cognizance.

In Matthews v. Crass ||, which was an action for words, occasioning loss of marriage; after verdict for the plaintiff, it was urged, on motion in arrest of judgment, that this was the first case where loss of marriage was ever laid for words spoken of a man, and therefore was not warranted by Ann Davis's case ¶. But the court conceived it to be

* 4 Co. 16.

† March. Rep. pl. 217. 1 Buls. 138.

‡ Shepp. Coll. 192.

§ Davis v. Gardiner. 4 Co. 16. Poph. 36. 1 Roll. Rep. 34, 35. 109. Mo. 409. Cro. Car. 155. Case of Sir C. Gerald's bailiff. Bull. N. P. 7.

|| Cro. Jac. 323.

¶ 4 Co. 11. vide infra.

immaterial, in case of loss of marriage, whether the plaintiff is a man or a woman.

In order to support an action grounded upon the loss of marriage, it is necessary for the plaintiff to allege and prove that a marriage with some specific person † was in contemplation, and was hindered by the speaking of the words.

The necessity of proving a specific loss, falls with peculiar hardship upon unmarried females, who are thereby frequently debarred from maintaining actions for imputations most unfounded and injurious. In no other case can it be more fairly presumed that the scandal, if believed, will produce detriment, than where an unmarried female is charged with incontinence; and therefore, in no other case is the plaintiff better entitled, in reason and good sense, to the benefit of that presumption, in order to obtain a remedy for the scandal, and, which is of infinitely more importance, an opportunity of fairly meeting and rebutting the calumny.

No species of slander can be more cruel and malicious in its origin, none more pernicious in its consequences; yet, unless some specific damage can be proved, or the charge be committed to writing, the suffering party, whose peace of mind is destroyed, and prospects ruined, has no

† 1 Roll. 36. l. 15. 1 Com. Dig. tit. Defam. D. 30.

appeal but to courts, whose powers, limited as they are, to the infliction of penance for the spiritual *benefit of the wrongdoer*, can administer no substantial relief or protection to the *party wronged*.

Yet it is this very jurisdiction of the ecclesiastical courts, which has frequently been assigned as a reason (though surely an inadequate one) why the temporal courts should not interfere to give a remedy in damages.

It has been said, that were the courts of law in such cases to entertain an action, it would be productive of hardship to the defendant, who would be twice punished for the same offence, by an award of damages in the temporal, and by the infliction of penance in the spiritual court.

This reasoning is evidently fallacious: if a man contrive, by one and the same act, to offend against religion, and to do a serious temporal injury to his neighbour; though the act be one and the same, it unites and comprehends offences wholly distinct, and it is absurd to say that the spiritual offence shall protect the offender from consequences merely temporal, and that, by rendering himself liable to a trifling penance, he shall rid himself of a load of temporal responsibility.

The objection, too, falsely assumes, that the payment of damages is in the nature of punishment; by the law of England, the amount of damages is in all cases to be measured by the tem-

poral prejudice sustained by the plaintiff, and they are awarded without any regard to the penal correction of the defendant, or the reformation of his manners; the reason, at all events, is a strange one to have weighed in a court of law, whose records abound with cases, which prove, that for the same act a person may be both civilly and criminally responsible.

Such, however, is the law upon this point, though formerly much doubt was entertained upon it.

In Ann Davis's case*, the plaintiff declared that she was a virgin of good fame, &c. and that one Anthony Elcock, citizen of London, of the substance of £3000, desired her for his wife, and had thereon conferred with John Davis her father, and was ready to conclude it, when the defendant, knowing the premises, but intending to injure the said Ann, and to obstruct the said Anthony's proceedings, published of the said Ann these words: "I know Davis's daughter well, she dwelt in Cheapside, and there was a grocer there that did get her with child;" by which the said Anthony refused to take her to wife.

After verdict for the plaintiff, it was moved in in arrest of judgment, that the words were not actionable, because the defamation was spiritual. But it was resolved by the whole court, that the action was maintainable:

* 4 Co. 16.

1. Because, if the woman had a bastard, she was punishable by the statute of 18 Eliz. c. 3.

2. That if the defendant had charged her barely with incontinence, the action would have been maintainable, since the ground of the action was temporal, namely, that she was defeated of her marriage.

But in subsequent cases *, the first of the reasons given in Ann Davis's case was denied to be law; and it was said, that the sole reason on which the judgment rested was the loss of marriage.

In Baldwin and his wife v. Flower †, it was held, that an action lay for calling the wife "whore," because, by such means, she might lose the communication and society of her neighbours.

In Medhurst v. Balaam ‡, the plaintiff declared she had several suitors to marry her; and that the defendant said of her, "She is with child, and hath taken physic for it;" by which she became in disgrace, and lost the society of her neighbours. And it was adjudged that the action lay, though no loss of marriage was alleged.

This has, however, been overruled in a variety of cases §.

In Ogden v. Turner ||, Holt C. J. observed, "To

* 1 Lev. 261. Sid. 397. Vent. 4.

† 3 Mod. 120.

‡ 1 Vin. Ab. 393. pl. 7. Sid. 397.

§ 1 Lev. 261. 2 Keb. 451. 1 Sid. 396. Lord Ray. 1004.

|| Holt. R. 40.

say of a young woman that she had a bastard, is a very great scandal, and for which, if I could, I would encourage an action; but it is not actionable, because it is a spiritual defamation, punishable in the spiritual court."

In Byron v. Emes*. A young unmarried woman, had been charged with gross incontinency. After a verdict for the plaintiff, it was moved, in arrest of judgment, that the words were not actionable, because they were of spiritual cognizance, and that no temporal loss had accrued; that to say, "a woman has a bastard," was never actionable before the statute for the provision of bastard children; and that, since the statute, it had never been held actionable but where the party had been brought within the penalty of the statute, which is only where the bastard becomes chargeable to the parish; that these words were most scandalous of a young woman; and that, had it been *res nova*, perhaps an action would have lain, but that there were many authorities to the contrary. That it was a crime of which the spiritual court had conusance, and could censure; and that it was not reasonable that the party should be liable to ecclesiastical censure and an action too, on which account Ann Davis's case had been often shaken, and judgment was given for the defendant.

* 12 Mod. 106. 3 Will. 3.

For similar words in Greaves v. Blanchet*, judgment, after verdict for the plaintiff, was arrested; the court observing, that they could not overthrow so many authorities, and that the reason was, that fornication was a spiritual offence, and that no action lay at Common Law for what the Common law took no notice of.

In the above case†, the court said also, that if it were *res nova*, it were reasonable to make the words actionable, for no greater misfortune can befal a young woman, whose well-doing depends upon her having a good husband, than to be reputed a whore; but the authorities are too many and great to run counter to them, the reason of them is, that fornication is a spiritual offence, not punishable at Common Law, and an action shall not lie for charging one with an offence of which the law takes no notice, without special damages; and if Ann Davis's case had been pursued as it had been contradicted, it would do.

From these and many similar authorities, it appears, that the judges have long ago felt themselves overpowered with the number of the decisions upon this point, constantly regretting that they were no longer at liberty to determine differently.

* Salk. 695. 6 Mod. 148.
† 6 Mod. 148.

Before this subject is dismissed, it may be proper to remark, that in the old decisions upon this point, the only question contemplated seems to have been, whether the words of incontinency * were actionable, as imputing *a crime*; and it does not appear to have been much considered, whether they were not actionable on the *broad plain ground* that they immediately tend to hinder the plaintiff's advancement in life by an advantageous marriage.

It may, perhaps, be too late to contend, that the plaintiff is entitled to recover upon this general principle; the courts, however, have manifested a desire to administer every relief in their power to plaintiffs of this description, so that the most trifling loss sustained in consequence of such slander, as of a dinner, or other hospitable but gratuitous entertainment †, will entitle the party to her action.

And, in general, wherever a person is prevented by the slander from receiving that which would otherwise have been conferred upon him, though gratuitously, the special damage will support an action. As where, in consequence of a charge of incontinence, a dissenting preacher was prevented from preaching‡ and receiving voluntary donations from his congregation.

* See the first resolution in Ann Davis's case, 4 Coke 16.

† Moore v. Meagher in Error, 1 Tau. 99.

‡ Hartley v. Herring. 8 T. R. 130.

* So, the loss of particular customers by a tradesman is an actionable special damage.

† And it is immaterial in such case, whether the words relate to his business or otherwise.

A mere apprehension of ill consequences cannot constitute a special damage; so that it has been held insufficient for the plaintiff to allege, that in consequence of the words, discord happened between him and his wife ‡, and he was *in danger* of a divorce.

Or, to allege that the plaintiff § was exposed to her parent's displeasure, and *in danger* of being put out of their house.

Or, to say he lost the affection of his mother ||, who intended him £100.

2. *How must the special damage be connected with the slander, to constitute a ground of action?*

It was said by Holt, C. J. that "At Common Law, if a man do an unlawful act, he shall be answerable for the consequences, especially where the act is done with the intent that consequential damage shall follow ¶."

* Barron v. Gibson, Lord Ray. 831. Str. 566. Bull. N. P. 7. 1 Lev. 140.

† 1 Lev. 140.

‡ 1 Roll. 34.

§ Barnes v. Bruddell, 1 Lev. 261.

|| Car. 1. 1 Com. Dig. tit. Defam. D. 30.

¶ Ld. Ray. 480.

But it is not essential that the damage should be the necessary and inevitable consequence of the slanderous words; it is sufficient, for instance, if they impose upon the plaintiff a violent and urgent motive for incurring expense.

In the case of Peake v. Oldham *, Lord Mansfield expressed an opinion, that the expenses of an inquest incurred by a plaintiff, who had been wrongfully accused of murder, might be considered as special damage.

The rule appears to be, that *the damage must be the mere, natural, and immediate consequence of the wrongful act.*

The defendant asserted, that the plaintiff had cut his master's cordage †; upon which the master discharged him, though under an engagement to employ him for a term. It was held by the court, that the discharge was not a ground of action; that the special damage must be the natural and legal consequence of the words spoken; and that the defendant was no more answerable for the discharge, than if, in consequence of the words, other persons had assaulted and thrown the plaintiff into an horse-pond.

The damage must be attributable *wholly* to the words; so that, where the reason of a person's refusing to employ the plaintiff was founded, *partly* on the defendant's words, and *partly* on the cir-

* Cowp. 277. † Vicars v. Wilcocks, 8 East, 1.

cumstance of his having been previously discharged by another master, it was held that no action was maintainable *.

And it seems, that in general †, where, in consequence of the words, a third person has refused to perform a contract previously made with the plaintiff, and which he was in law bound to perform, no action is maintainable; for the plaintiff, in such case, is entitled to a compensation for the non-performance of the contract; and, were he allowed to maintain his action for the slander, he would receive a double compensation for the same injury: first, against the author of the slander; and secondly, against the person who had refused to perform his agreement.

This legal difficulty may, in some instances, be productive of hardship to the plaintiff: he may resort, it is true, to his legal remedy against the person refusing to perform his contract; but this can scarcely be considered as a full and real compensation to the party, who, by the defendant's wrongful act, has had a benefit in possession wrested from him, and converted into a bare legal right.

The defendant ‡ having libelled a performer at a place of public entertainment, she refused to sing, and the proprietor brought his action on the ground of special damage, alleging that his oratorios had, in

* 8 East, 1.

† 2 Bos. & Pull. 284. 8 East, 1.

‡ 1 Esp. R. 48.

consequence of her absence, been more thinly attended. But it was held, by the learned judge who presided at the trial, that the injury was too remote; that if the performer was really injured, an action lay at her suit; and that it did not appear but that her refusal to perform arose from caprice or indolence.

The plaintiff having once recovered damages in an action for words, cannot afterwards recover an ulterior compensation for any loss subsequently resulting from the same words *. Where the plaintiff †, knowing the defendant's sentiments, procures the publication of that from which damage results, he will not afterwards be at liberty to ascribe his loss to the defendant's act, but be considered as the voluntary author of the mischief which follows.

* Bull. N. P. 7. † 3 B. & P. 592. 5 Esp. R. 15.

CHAPTER VIII.

Of the Defendant's Wrong.

HAVING thus considered the nature and quantity of the damage which the plaintiff must have sustained, to entitle him to a legal compensation, the next question for inquiry is, *When shall the act of communication be deemed a wrong?* Since, as has already been seen*, it is the connection of the plaintiff's loss with the defendant's wrong †, which renders the title to a remedy by action complete. The wrongful act of the defendant is compounded,

1. Of the mere mechanical means by which the communication is effected.

2. Of the malicious intention with which it is made.

In order to support an action, it is of course essential that the slanderous matter should ~~be~~ have been conveyed to the mind of a third person, or, in technical language, should be published, for otherwise no detriment can have accrued from the ~~plain~~ Defendants.

* P. 15.

† 1 Com. Dig. tit. Action on the Case. B. 1. 4 T. R. 141.

this act; but, with the exception of the case of libel, the means of publication are indifferent, and do not affect the relevancy of the action.

In the case of libel, it is sufficient if the defendant be the partial instrument of communication, either by assisting in its original construction or subsequent promulgation; since, if one party were to dictate, a second to write, and a third to distribute written or printed slander, the plaintiff would be left without remedy, unless each of these parties were to be considered as responsible for the whole effect produced.

The subject of publication will hereafter be discussed as a matter of evidence; assuming therefore for the present, that some publication * has been made to a third person, with the defendant's knowledge, and through his procurement, the next point for consideration is—

The *malicious intention* with which he published.

The characteristic of wrong, in these cases, is, the wilful design and intention of the defendant to injure the object of his publication.

Every definition of the subject matter of an action for slander, to be found in the books of reports, or elementary writers, includes malice as an essential ingredient; whence it may be laid down as a general position, that whenever a damage, of the nature described in the preceding

* See Baldwin v. Elphinstone, Bl. Rep. 1037.

chapters, results from a malicious intention on the part of the publisher, an action is maintainable.

There is, however, a distinction between malice, when used in the strict legal sense of the word, as the characteristic of the defendant's wrong, and as understood in its moral and more popular acceptation.

In the latter sense, malicious slander consists in "*The relating either truth or falsehood for the purpose of creating misery."

But the law, from reasons of policy, in many instances, presumes conclusively that the intention of the party was innocent, or at least will not suffer his motives to be questioned in an action for slander.

And this happens where he is acting under the immediate sanction of the law, in the performance of some public or private duty; in such cases, he may publish that which is detrimental to another, either from a sense of duty, or, as is very possible, may take advantage of his situation for the purpose of mischief and vexation. Now, though the moral offence, which depends merely upon the malicious intention, cannot be extenuated, but is rather aggravated by the selection of such an opportunity for effecting mischief, yet the law, on account of the inconveniences and perplexities which would arise from inquiring in such cases, into the real

* Paley's Philosophy, Vol. I. p. 286.

motives by which the party was influenced, prohibits such investigation, and will not permit the act to be attributed to any other origin, than the proper and conscientious one suggested by the situation of the defendant.

Were every malicious and oppressive act to be considered illegal, the law would be very agreeable to the theorist, but utterly unfit for the practical purposes of society, on account of the infinite perplexity and uncertainty which would occur in distinguishing between bad and good motives, where the act done might arise from either source. The secret purpose of a man's heart is of too difficult ascertainment to be made the general criterion of legal right or wrong; and hence it is that the law, which must resort to more plain and certain evidence, on which it may found more precise prescriptions, may not unfrequently become the instrument of oppression. For example: where a creditor, from motives of malice and revenge, and not with a view to his legal remedy, deprives his debtor of liberty; as a matter of conscience the act is criminal and unjustifiable; yet it must be sanctioned and tolerated by the law, in order to avoid consequences most pernicious and absurd; for were it otherwise, a man's security for his debt would depend on the temper and disposition of his mind, upon his motive for becoming a creditor in the first instance, and his reasons for enforcing his claim in the second; and, however

pure his intention, he might be deterred from proceeding, by the apprehension of being involved in litigation, upon a suggestion of malice, by his adversary.

And the same kind of reasoning is applicable to the case of slander: it would frequently lead to too nice and critical an investigation, to inquire whether a person, who published words in the course of performing a public duty, was actuated by malice and ill-will, or by conscientious motives; and much inconvenience would arise, were persons to be deterred from the performance of public duties, or from a fair prosecution of their claims, by the apprehension of the liabilities and danger to which they exposed themselves.

In an action for slander, the defendant's malice is immaterial,

1. Where the imputation is true;

2. Where the publication is made in the regular course of parliamentary or judicial proceedings;

3. Where such proceedings are faithfully reported.

In such cases, the law, considering the benefit which society derives from the exposure of villainy, or rather, perhaps, the impropriety of a person's recovering damages in a proceeding tainted with his own misconduct; the necessity of securing those who have public duties to perform, or private claims to enforce, from the apprehension and fear of collateral consequences, and the ad-

vantages derived from the publicity of parliamentary or judicial proceedings, will not, however malicious and reprehensible the defendant's intention may, in fact, have been, allow his motives to be questioned in an action for the scandal.

CHAPTER IX.

Where the Imputation is true.

WHERE the defendant has asserted no more than is true, the consequent damage is immaterial, since the law will not allow the plaintiff to attribute his loss to the defendant's act, for the purpose of obtaining a compensation by action.

Sir William Blackstone *, in his Commentaries, seems to consider the defendant's exemption in this instance as extended to him in consideration of his merit in having warned the public against the evil practices of a delinquent. He says, that it is *damnum absque injuria*, intimating that the act of the defendant does not constitute a *wrong* in its legal sense; and then proceeds to observe, that this is agreeable to the reasoning of the civil law, "*Eum qui nocentem infamat non est æquum et bonum ob eam rem condemnari, delicta enim nocentium cognita esse oportet et expedit.*" Notwithstanding this, there seems to be some difficulty in supporting this justification, on the ground that the defendant's act is not, in contemplation of law, a

* 3 Bl. Com. 125.

wrong, since, as will be seen, it is considered as such in the criminal proceeding, and if the act be justifiable because it confers a public benefit, it must be so to all legal purposes; for it would savour too much of paradox to say, that in respect of an individual claiming a private compensation, the act is innocent, because it is beneficial to the public, but that, in relation to the public so benefited, the same act is wrongful. It may, therefore, be more consistent to consider the plaintiff as having excluded himself from the protection of the courts by his own misconduct, than to attribute the exemption to any merit appertaining to his adversary.

When a plaintiff is really guilty of the offence imputed, he does not offer himself to the court as a blameless party seeking a remedy for a malicious mischief, his original misbehaviour taints the whole transaction with which it is so closely connected, and precludes him from recovering that compensation to which an innocent person would be entitled.

That the truth was a good justification, does not appear to have been doubted in the case of words spoken; in respect of an action for libel, indeed, the contrary has been maintained; but the authorities upon this point, which are very scarce, seem to preponderate much in favour of the justification.

In the case of the King v. Roberts *, Lord Hardwicke, C. J. is said to have thus expressed himself on a motion for an information against the defendant: "It is said, that if an action were brought, the fact, if true, might be justified; but I think that is a mistake, such a thing was never thought of in the case of Harman v. Delany †. I never heard such a justification in an action for a libel even hinted at, the law is too careful in discountenancing such practices; all the favour that I know truth affords in such a case is, that it may be shewn in mitigation of damages; and of the fine in an indictment or information."

And in another case, it was said by Lee, C. J. ‡ (upon the trial of the defendant upon an information), that it had always been holden that the truth of a libel could not be given in evidence by way of justification; because, where the person charged with any crime is guilty, he ought to be proceeded against in a legal course, and not reflected upon in such a manner. In the King v. Bickerton §, the Chief Justice ‖ observed, (upon a motion for a criminal information), that though truth be no justi-

* B. R. M. and G. 2. MSS. 3 Bac. Ab. 455. Dig. Law Lib. 16. Sel. Ni. Pri. 1st Edit. 929.

† Str. 898.

‡ Sel. Ni. Pri. 1st Ed. 929.

§ Str. 498.

‖ Sir J. Pratt.

fication for a libel, as it is for defamatory words, yet it would be sufficient cause to prevent the extraordinary interposition of the court.

In the two last cases, the dicta of the learned Judges cannot but be understood as spoken with reference to the criminal proceeding before them, and therefore as no authorities in respect of an action.—On the other hand, Hobart, C. J. in the case of Lake v. Hatton*, said, that a libel, though the contents be true, may be justified in an action upon the case.

And Holt, C. J. laid it down expressly, that "A man † may justify in an action for words or for a *libel*, otherwise in an indictment."

In the case of J. Anson v. Stuart ‡, the truth was pleaded in bar of the action for written slander, and no objection was made, or exception taken, either by the court or the plaintiff's counsel, to the defendant's right to avail himself of a defence of that nature.

Sir William Blackstone seems to have been of opinion, that the truth was a good justification in case of an action for libel; since, after asserting that it is a good defence in case of slander spoken §, he adds, "What was said with regard to words spoken, will also hold in every particular

* Hob. Rep. 253.
† 11 Mod. 99.
‡ 1 T. R. 748.
§ 3 Bl. Com. 125.

with regard to libels by printing or writing, and the civil actions consequent thereupon*.

With respect to an action for Scandalum Magnatum, it was resolved in the Earl of Northampton's case†, that "the publishing of false rumours, either concerning the king or of the high grandees of the realm, was in some cases punishable by the Common Law; but of this were divers opinions. Yet it was resolved in general, that touching the matter and quality of the words, that they ought to be *false* and horrible."

North, C. J.‡ was of opinion, that under the statute, the defendant could not justify in an action for scandalum magnatum. But both Atkins and Scroggs, justices, thought differently; and the latter held, that the words in the principal case might have been justified by shewing the special matter either in pleading or evidence.

And in Lord Cromwell's case§, the defence in such an action seems to have been considered on the same footing with a common action for slander. The general rule, therefore, seems to be, that in action for words, their truth is a good justification.

The plaintiff was charged as accessary to a fe-

* See also 3 Wood. 182; 3 Bl. Com. 125, 14th ed.; and Selwyn's Ni. Pri. 1st ed. 929.

† 12 Rep. 133.

‡ 2 Mod. 150.

§ 4 Co. 13.

lony, the principal having been acquitted; and it was held competent for the defendant to go into evidence to prove his guilt, because what had passed between others could not affect him.

Where * the words imputed a charge of murder, for which the plaintiff had been tried and acquitted, it was held that the defendant might justify specially, and that the truth of such plea might be tried. And it has been said, that where the defendant justifies specially, by pleading the truth of a capital offence imputed to the plaintiff †, on such issue being found against the plaintiff, he may be put upon his trial for the offence without the intervention of a grand jury.

The justification must be pleaded, and proved with great precision. Thus, if the defendant tax the plaintiff with having feloniously stolen a sum of money, it will be no justification that the plaintiff had in fact ‡ stolen some other personal chattel.

So, where the defendant § said of a counsellor at law, "You are a paltry lawyer, and use to play on both hands." The defendant justified as to the latter words, that the plaintiff had devised certain articles against F. R. concerning misdemeanors supposed to have been done by him, and after-

* England v. Bourke, 3 Esp. R. 80.
† 3 Esp. R. 133. Cook v. Field.
‡ Cro. J. 676.
§ Cro. J. 267.

wards promised F. R. that he should not be molested by reason of the said articles; and yet, notwithstanding, by the procurement of others, the plaintiff endeavoured to prosecute F. R. upon the said articles, before the chancellor and commissioners of the Archbishop of Canterbury;" and the plea was held bad on demurrer.

No suspicion, however strong, will amount to a justification *.

Neither is common fame any ground for justifying an extra-judicial charge †.

In Cuddington v. Wilkins ‡, which was an action for publishing these words of the plaintiff, "He is a thief;" the defendant pleaded, that the plaintiff had been guilty of stealing six sheep. The plaintiff replied, that after the felony, and before the publication of the words, he had been pardoned by a general pardon. Upon a demurrer; this replication was holden to be good, inasmuch as the guilt, as well as the punishment, is taken away by a pardon. And it was held, that it makes no difference in such case, whether the pardon be general or special, of which the defendant might have been ignorant, for that every person who publishes slanderous words does it at his peril.

But it was said, that if he had been con-

* Powell v. Plunkett, Cro. Car. 52.

† Hutt. 13. Bridg. 62. Brownlow, 2.

‡ Hob. 81.

victed and pardoned afterwards, it would be otherwise.

And * a pardon after a conviction of perjury will not restore the perjured person to his credit.

It has long been settled †, that the truth, if relied upon as a justification, or even in mitigation of damages, must be pleaded. And since the degree of certainty and precision necessary to complete a justification of this nature is inseparably connected with the form and rules of pleading, further remarks upon this topic will be reserved for the division in which the technical mode of framing the plea is considered.

* Sid. 92. † Str. 1200.

CHAPTER X.

Of Publications made in the course of Parliamentary or Judicial Proceedings.

IT may next be considered, how far a person is protected from the effect of words published in the course of parliamentary or judicial proceedings.

Here a distinction naturally suggests itself, between cases where a party is by law called upon to execute a public duty, and those where his act is merely voluntary. Under the former division may be classed members of either house of parliament, and judges, jurors, and witnesses, in any of our courts of justice. Under the latter, petitioners or suitors, their counsel and attornies, who are constrained by no legal obligation to apply for the redress of grievances on the behalf of themselves or their clients, but who are nevertheless by law invited to prefer their complaints for the purposes of justice.

In the first place *, it seems that no member of either house is in any shape responsible in a court of justice for any thing said in that house, however offensive the matter may be to the feelings, or

* 1 Esp. R. 226.

detrimental to the interest of any individual *; for policy requires that those who are by the constitution appointed to provide for the safety and welfare of the public, should, in the execution of their high functions, be wholly uninfluenced by private considerations. Accordingly, in such cases, (as has been asserted by a high authority †), courts of law possess no jurisdiction. But the privilege does not extend beyond the walls of the house to which the member belongs: and a peer, who publishes ‡ libellous matter in the public prints, as having constituted part of his speech in parliament, is as open to an action or prosecution as any private individual.

The same rule, as to impunity, suggested and governed by similar principles, applies to judges, juries, and witnesses, in respect of any thing published by them in the course of a judicial proceeding.

Certain charges § having been preferred by the plaintiff against an officer of his own regiment, the

* By 4 Hen. 8. c. 8. members of parliament are protected from all charges against them for any thing said in either house.

And this is further declared in the Bill of Rights. 1 W. M. st. 2. c. 2. See 1 Bl. C. 164.

† Lord Kenyon, in the King v. Lord Abingdon. 1 Esp. Rep. 226.

‡ 1 Esp. R. 226.

§ 2 N. R. 341.

court martial, after acquittal, subjoined the following declaration:

"The court cannot pass, without observation, the malicious and groundless accusations that have been produced by Captain J. against an officer whose character has, during a long period of service, been so irreproachable as Colonel Stewart's; and the court do unanimously declare, that the conduct of Captain J. in endeavouring falsely to calumniate the character of his commanding officer, is most highly injurious to the good of the service." For this the plaintiff brought his action against Sir J. Moore, the president of the court martial. Upon the trial of the cause before Sir J. Mansfield, C. J. it appeared, that the supposed libel formed part of the opinion of the court, delivered by the defendant to the Judge Advocate, for the purpose of being submitted to the king, and immediately followed the declaration of the opinion of the court martial.—"That he, the aforesaid Colonel Richard Stewart, is not guilty of either of the charges, and the court do most fully and honourably acquit him." The plaintiff was nonsuited.

And afterwards a new trial was refused, on the ground that the words complained of formed part of the judgment of acquittal.

So it is held, that no presentment * by a grand

* Bac. Ab. tit. Libel, 455. Mo. 627. Haw. P. C. c. 73. s. 8: See also the observations of the court in Johnson v. Sutton, 1 T. R.

jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do; but also, because it would be of the utmost ill consequence any way to discourage them from making their inquiries with that freedom and readiness which the public good requires.

Several of the authorities in the books cited relate to cases of criminal prosecution, but the reasons and principles are equally forcible, when applied to a civil action, since the same policy in both cases opposes itself to the calling in question the motives of the parties.

Witnesses, like jurors, appear in court * in obedience to the authority of the law, and therefore may be considered, as well as jurors, to be acting in the discharge of a public duty; and though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not responsible in a civil action for any reflections thrown out in delivering their testimony.

The plaintiff brought an action † against one L., and the defendant being produced as a witness at the trial, gave evidence that the plaintiff was a

* See 2 Inst. 228. 2 Rolls Rep. 198. Pal. 144. 1 Vin. A. 387. Cro. Eliz. 230.

† Brownlow 2. Harding v. Bulman. Hast. 11.

common liar, and so recorded in the Star-Chamber; by reason whereof the jury gave the plaintiff small damages. After verdict for the plaintiff for this alleged slander, it was moved in arrest of judgment, that the action did not lie; for if it did, every witness might be charged upon such a suggestion, and judgment was given for the defendant *.

With respect to petitioners in parliament, and suitors or prosecutors in courts of law, it has been held, that no proceeding, according to the regular course of justice, will make the complaint amount to a libel, so as to render the party criminally liable, on the ground that it would be a great discouragement to suitors to subject them to public prosecutions in respect of their applications to a court of justice; and that the chief intention of the law, in prohibiting persons to revenge themselves by libels or any other private manner, is, to restrain them from endeavouring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those whom the law has appointed to determine them †.

* It has been doubted, whether a preconcerted scheme for taking away the life of another by false evidence, for the sake of obtaining a statutable reward upon conviction, amounts, when carried into effect, to the crime of murder.—See Leach's C. C. L. 52. Foster 130.

† Dyer, 285. 2 Ins. 228. 2 Buls. 269. Godb. 340. Pal. 145. 188. Vent. 23. Haw. Pl. C. c. 73. s. 8. 3 Bac. Ab. 494.

And the same reasons oppose themselves to allowing an action to be maintained, grounded upon such a proceeding.

In the case of Lake v. King *, the plaintiff declared that he was a doctor of laws, and vicar-general to the Bishop of Lincoln; and then set forth the libel complained of, which charged him with extortion, vexation, oppression, and other misdemeanors in his office.

The defendant pleaded that the matter was true, and that therefore he procured the petition (which was the libel complained of) to be engrossed, and delivered to the committee appointed by the commons to hear and examine grievances; and that afterwards, for the better manifestation of the grievances contained in the said petition, he caused the same to be printed, and delivered to the members of the committee. The plaintiff demurred. It was agreed on all hands, that the exhibiting the petition to the committee of parliament was lawful, and that no action lay for it, although the matter contained in the petition was false and scandalous, because it was in the summary course of justice, and before those who had power to examine whether it was true or false.

It appears that this case† was much considered, and that the judgment was given for the defendant, after it had depended twelve terms, by Hale, C. J.

* 1 Saun. 131. † Lev. 241. 1 Mod. 58. Sid. 414.

and Twisden and Rainsford, Justices, on the ground that it was the order and course of proceeding in parliament to print and deliver copies of petitions, of which the court would take notice.

But it was held, that to have distributed the printed copies to any but members of parliament would have been actionable.

And that, in general, where the printing was not warranted by the necessity of so great a number of copies, to print them would be actionable*; but that, in the principal case, the printing them (which is a publishing of them to the printers and compositors) was not so great a publication as to have so many copies transcribed by several clerks.

It appears to have been urged in favour of the plaintiff, that the complaint was made to a court which had not power to redress it. But in the case of Kemp v. Gee †, it was resolved by the House of Commons, that Gee was guilty of a breach of privilege in suing Kemp and others for a libel, supposed to be contained in a petition presented to the house for a redress of grievances, and that all petitions to them were lawful, or at least punishable by themselves only.

So, no action lies for any allegation, pleading,

* Sid. 414.

† 9 Feb. 8. W. 3. See C. J. Holt's argument in the case of Ashby v. White. Dig. L. L. 18.

or other matter *, published in the usual course of a civil or criminal proceeding in courts of justice. The reason for which is, that † if actions should be permitted in such cases, those who have just cause of complaint would not dare to complain, for fear of infinite vexation. And, as was observed by Lord Mansfield, C. J. ‡ there can be no scandal if the allegation be material; and if it be not, the court before whom the indignity is committed, by immaterial scandal, may order satisfaction, and expunge it out of the record, if it be upon the record.

So, where ‖ the plaintiff declared that the defendant, in a certain affidavit before the court, had sworn that the plaintiff in a former affidavit had sworn falsely; the court held that this was not actionable, for that in every dispute in a court of justice, where one, by affidavit, charges a thing which the other denies, the charges must be contradictory, and there must be affirmation of falsehood; and this being necessary in a legal proceeding, no action would lie for it.

So in trespass §, if the defendant, in his plea of justification, falsely aver that the plaintiff was a bankrupt, and that the defendant had a commis-

* 1 Roll. 33.
† 4 Coke, 14.
‡ 2 Burr. 817.
‖ Astley v. Young. 2 Burr. 817.
§ Cro. J. 432.

sion upon the statute, by virtue of which those goods were delivered to him; yet the plaintiff, for the words, cannot maintain an action.

In Weston v. Dobniet *, the plaintiff declared, that there was a suit in the spiritual court between one A. and the defendant, wherein A. produced the now plaintiff as a witness; that the defendant having a day given to except against the witnesses, put in his exceptions in writing, alleging, that the now plaintiff was not a competent witness, and that there ought not any credit to be given unto him, because he was perjured. Whereupon the plaintiff (pending the suit) brought the action for this scandal; but the whole court held that the action was not maintainable, because the proceeding was in the common course of justice, and not *ex malitia*.

And in criminal prosecutions, it seems perfectly established, that no action will lie for any distinct matter disclosed in the course of such proceeding, but that the party must seek his remedy for a malicious and groundless prosecution, either by writ of conspiracy or by a special action on the case, founded upon the whole of the circumstances *.

Sir Richard Buckley † brought an action against Owen Wood, for exhibiting a bill against him in the Star Chamber, and charging him with several

* 3 Bl. Com. 126. 10 Mod. 210. 219. 200. Str. 691.
† 4 Co. 14.

matters examinable in that court; and charging him further, that he was a maintainer of pirates and murderers, and a procurer of pirates and murderers, which offences were not determinable in the Star Chamber.

And it was resolved by the whole court, that for any matter that was contained in the bill that was examinable in the said court, no action lies, although the matter be merely false, because it was in the course of justice; and that this agreed with the judgment before given in Cutler v. Dixon *. But it was also resolved, that for the words not examinable in the Star Chamber, an action on the case lies, for that cannot be in a course of justice; and that if such matter might be inserted in bills in so high a court to the great slander of the parties, and they cannot answer it to clear themselves, nor have their action as well to clear themselves, as to recover damages for the great injury and wrong done them, great inconvenience would ensue.

That by law, no murder or piracy could be tried by bill, but by indictment only; and therefore, that the defendant had not only mistaken the proper court, but the manner and nature of the bill had not any appearance of a suit in the ordinary course of justice.

But that if a man brought an appeal of murder returnable in the common pleas, no action would

* Dyer, 285.

lie; for, though the writ was not returnable before competent judges, yet it is in the nature of a lawful suit, namely, by writ of appeal."

The first part * of this resolution has been frequently confirmed, and extends to all proceedings in the regular course of justice, and to actions for scandalum magnatum †.

The defendant ‡ brought a writ of forger of false deeds against Lord Beauchamp; and, pending the writ, Lord B. brought an action for the scandal. The defendant justified by his having the said writ before. Upon demurrer, the justification was holden to be good, and out of the intendment of the law and statutes of slander.

And if the publication be made in the course of a judicial proceeding, it does not appear to be essential to the justification that the defendant strictly observed the technical mode of proceeding.

The plaintiff declared, that he made an affidavit to have the defendant bound over to his good behaviour; and that the defendant, in the hearing of the justices and officers § of the court and others present, said, "There is not a word of truth in that affidavit, and I will prove it by forty witnesses." And it was held that the words were justifiable, being in a judicial way.

* 2 Inst. 228. Roll. Ab. 87. pl. 4. Sir W. Jon. 431.
† 2 Buls. 269. 2 Burr. 808. 3 Bac. Ab. 492.
‡ Lord Beauchamp v. Sir R. Croft, Dyer, 285.
§ Jo. 341. Mar. 20. Boulton v. Clapham.

And the same rule obtains where application is made in the usual course to a magistrate or other peace officer.

The defendant went to a justice* of the peace for a warrant againt the plaintiff, for stealing his ropes. The justice said, "Be advised, and look what you do;" and the defendant replied, "I will charge him with flat felony, for stealing my ropes from my shop."

The court agreed, that these words being spoken to a justice of the peace when he came for his warrant, which was lawful, would not maintain an action; for if they could, no other would come to a justice of the peace to inform him of a felony.

By the latter resolution, in the case of Buckley v. Wood †, the court decided that scandalous matter *would be actionable*, if exhibited by means of an improper process, *and* in a court which had no jurisdiction over the subject matter; but it plainly appears that the court held, that both impropriety of process and want of jurisdiction must concur to deprive the defendant of his justification; for it was expressly said, that the bringing a writ of appeal of murder in the common pleas would not be actionable; since, though they wanted jurisdiction in the particular instance, yet that the proceeding by writ of appeal was in the nature of a lawful suit.

* Hutt. 115. Mich & Can. Rain v. Langley.
† 4 Co. 14.

In Lake v. King*, the court said, that notwithstanding what was reported in Buckley's case, it was held that want of jurisdiction will not make a libel, for it is only the error of counsel.

Powel, J. † is reported to have said, "I have heard my Lord Hale say, that for putting matters in a bill, of which the court hath no cognizance, action does not lie against the plaintiff, though in the fourth report it is laid down otherwise.

Serjeant Hawkins ‡, in his Pleas of the Crown, observes, "It has been holden by some, that no want of jurisdiction of the court, to which such a complaint is exhibited, will make it a libel, because the mistake of the court is not imputable to the party, but to his counsel. Yet, if it shall manifestly appear, from the whole circumstances of the case, that a prosecution is entirely false, malicious, and groundless, and commenced not with a design to go through with it, but to expose the defendant's character under a shew of legal proceeding, I cannot see any reason why such a mockery of public justice should not rather aggravate the offence than make it cease to be one, and make such scandal a good ground of indictment at the suit of the king, as it makes the malice of the proceeding a good foundation of an action on the case,

* 1 Vin. Ab. 389. note to pl. 67.

† 2 Lut. 1571.

‡ Pl. Cr. c. 73. s. 8. See also Serj. Williams's note, 1 Saund. 132.

at the suit of the party, whether the court had jurisdiction or not."

From these authorities it may be collected generally, that *no action can be maintained for any thing said, or otherwise published, in the course of a judicial proceeding, whether criminal or civil*, though for a malicious and groundless prosecution, an action, and perhaps an indictment, may be supported, founded on the whole proceeding.

It must, however, be recollected, that the justification does not extend to any publishing which the usual course of judicial proceeding does not warrant. Thus, in Lake v. King, the great doubt was, not whether the exhibiting the petition to parliament was lawful or not, but whether the defendant was warranted in printing and publishing it in the manner alleged * in his plea.

And so, in the case of Hare v. Meller †, it was adjudged lawful to present a petition to the queen, though reflecting upon the character of the plaintiff; but deemed actionable afterwards to divulge the contents to the disgrace of the person intended.

* 1 Saund. 132.

† 3 Lev. 169. See also 4 Rep. 14.

CHAPTER XI.

Where Parliamentary or Judicial Proceedings are faithfully reported.

IN general, impartial and correct accounts of the proceedings in parliament, or in the courts of justice, do not, in legal contemplation, amount to a wrong, so as to render the party publishing them either civilly or criminally responsible.

Upon an information against the defendant, for publishing* "Dangerfield's Narrative," he pleaded that he was, at the time of the publication, Speaker of the House of Commons, and as such, had a right to publish the votes and acts of the house, and that the narrative was printed and published as parcel of the proceedings; and notwithstanding this, the court gave judgment for the king †.

But in the King v. Wright ‡, an application was made to the Court of King's Bench, to grant a criminal information against the defendant, for printing and publishing a libel on an individual. Upon

* R. v. Williams. 2 Show. R. 471. Comb. 18. See Sir R. Atkyns on the Power of Parliament.

† This case was reprobated by Lord Kenyon, C. J. and Grose, J. giving judgment in the King v. Wright. 8 T. R. 293.

‡ 8 T. R. 293.

the defendant's affidavit, it appeared that the charge complained of was a paragraph contained in the report of the Committee of Secrecy of the House of Commons, a literal copy of which he had published.

After hearing counsel on the part of the applicant, the information was refused. Lord Kenyon, C. J. observing, " As this was a true copy of the report of the House of Commons, I think there was not the least pretence for the motion; the application supposes that the publication is a libel, but it is impossible to admit that the proceeding of either of the houses of parliament is a libel.

The case of Sir W. Williams, which was principally relied on, happened in the worst of times, but that has no relation to the present case. There the publication was the paper of a private individual, and under pretence of the sanction of the House of Commons, an individual published; but this is a proceeding by one branch of the legislature, and therefore we cannot inquire into it.

Grose, J. said, " On looking into the judicial proceedings of this court, I find no instance of such an information as the present; the case of Sir W. Williams is most like this, but it must be remembered, that that was declared by a great authority to be a disgrace to the country."

Lawrence, J. observed, " It has been said, that the publication of the proceedings in courts of justice, when reflecting on the character of an indi-

vidual, is a libel; to support which position, the case of Waterfield v. the Bishop of Chichester has been cited*; but, on examining that case, it appears that the charge there was, that the plaintiff had not published *a true account*. The proceedings of courts of justice are daily published, some of which highly reflect on individuals, but I do not know that an information was ever granted against the publisher of them. Many of these proceedings contain no point of law, and are not published under the authority or the sanction of the courts, but they are printed for the information of the public. Not many years ago, an action was brought in the Court of Common Pleas by Mr. Currie †, against Walter, the proprietor of the Times; for publishing a libel in the paper of "The Times;" which supposed libel consisted in merely stating a speech made by a counsel in this court, on a motion for leave to file a criminal information against Mr. Currie. L. C. J. Eyre, who tried the cause, ruled that this was not a libel, nor the subject of an action, it being a true account of what had passed in this court; and in this opinion the Court of Common Pleas afterwards, on a motion for a new trial, all concurred, though some of the judges doubted whether or not the defendant could avail himself of that defence on the general issue: "though the publication of such proceedings may be to the dis-

* 2 Mod. 118. † 1 B. & P. 525.

advantage of the particular individual concerned, yet it is of the utmost importance to the public that the proceedings of courts of justice should be universally known.

"The great advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. The same reasons also apply to the proceedings in parliament; it is of advantage to the public, and even to the legislature besides, that true accounts of their proceedings should be generally circulated, and they would be deprived of that advantage, if no person could publish their proceedings without being punished as a libeller.

"Though, therefore, the defendant was not authorized by the House of Commons to publish the report in question, yet, as he only published a true copy of it, I am of opinion that the rule ought to be discharged."

But in Styles v. Nokes*, it was observed by Lord Ellenborough, C. J. and Grose, J. that it must not be taken for granted that the publication of every matter which passes in a court of justice, however truly represented, is, under *all circumstances*, and with *whatever motive* published, justifiable, but that doctrine must be taken with some grains of allowance. "It often happens," said Lord Ellen-

* 7 East, 493.

borough, "that circumstances, necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry, are very distressing to the feelings of individuals on whom they reflect. The protection afforded by law to such publications does not, however, extend beyond a plain unvarnished statement of the proceeding, and will not warrant the least misrepresentation of facts, or even any high colouring of the circumstances stated."

Lofield * having recovered in an action against Bankcroft, for maliciously charging him with felony and for procuring him to be arrested on suspicion of the same, afterwards published that Bankcroft had *conspired* to charge him with this felony, and that, in vindication of his character, he had brought an action against him for so doing, and had recovered £1100 damages against him." On a motion for a criminal information, the court said, that the present advertisement had falsely represented the fact, for Lofield did not bring his action for a conspiracy, but for Bankcroft's maliciously charging him with felony, and a conspiracy requires an infamous judgment. The rule was made absolute.

It has been held, that the publication of matter contained † in depositions before a magistrate on

* Easter Term, 5 G. 2. 1732. 2 Barnard. K. B. 128. The King v. Lofield.

† R. and Lee, 5 Esp. 123.

a criminal charge, is not justifiable, the evidence being *ex parte*, and the deposition made by the prosecutor only.

A still stronger reason for prohibiting such premature statements is, that they induce a prejudice against the defendant, and tend to deprive him of the benefit of a fair and impartial trial.

The printer*, publisher, and editor of a public newspaper, were indicted for publishing a paragraph, purporting to contain the examinations before a magistrate, upon a charge brought against the prosecutor by Mrs. Popplewell; the publication then proceeded to assume the truth of the depositions, and the guilt of the prosecutor, and to pronounce that he would meet with the reward due to his villainy.

It was contended, on the authority of several of the cases above cited, that the publication was justifiable, as being a true account of the proceedings in a court of justice.

But Lord Ellenborough, C. J. said, "Trials at law fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged, the benefit they produce is great and permanent, and the evil that arises from them is rare and incidental; but these preliminary examinations have no such privilege, their only tendency is to pre-

* The King v. Fisher and others, 2 Camp. 563.

judge those whom the law still presumes to be innocent, and to poison the sources of justice. It is of infinite importance to us all, that whatever has a tendency to prevent a fair trial should be guarded against. Every one of us may be questioned in a court of law, and called upon to defend his life and his character; we should then wish to meet a jury of our countrymen with unbiassed minds; but for this there can be no security, if such publications are permitted."

CHAPTER XII.

IN the two classes of cases immediately preceding, the presumption of law is conclusive in favour of the defendant's innocence of intention. There is another, in which, though the motive of the party be not wholly exempted from examination, yet, in consideration of the character in which he has acted or assumed to act,—the law will presume in his favour in the first instance, and require the plaintiff to rebut the presumption in some particular mode.

And the benefit of this *prima facie* presumption enures in a greater or less degree to all defendants, who *claim an interest* for themselves or others; as where a person makes an extra-judicial claim to an estate, or a counsellor speaks on behalf of his client in a court of justice.

To those who act in a *friendly character* towards the ~~defendant~~ plaintiff, as by communicating a slanderous report, and the author of it, to enable him to obtain a remedy.

And to those, in general, who appear to act in the discharge of any duty which the convenience or exigencies of society call upon them to perform; as, where a master gives the character of a servant,

of a critic that of a book, for the information and advantage of the public.

The nature and extent of the presumption of law in each of these cases will next be considered, and the means by which they may be rebutted.

And first, *where a party, having probable cause, claims any title or interest.*

When a party lays claim to land or other property, by means of which the real owner is prejudiced, though the words be not spoken in the ordinary course of justice, (in which case, as has already been seen, no action would be maintainable) yet, if the party had probable cause and colour for what he said, no action is maintainable, although no legal claim exist in fact. And the reason assigned for this by Sir E. Coke is*, that if an action should lie when the defendant himself claims an interest, how can any make claim or title to any land, or begin any suit, or seek advice and counsel, but he should be subject to an action which would be inconvenient; and that this was agreeable to the opinion in Banister's case †, that no action lies against one who publishes another to be his villain, without adding something by way of threat, which produces special damage.

* 4 Rep. 18.

† Fitz. Action sur le Case, 16 Bro. Ac. sur le Case, 90. 2 E. 4. 5. a. b. 15 Ed. 4. 32. a. b. 22 E. 3. 1. Conspiracy. 38 E. 3. 33. 43 E. 3. 20. F. N. B. 116. b.

But if the defendant say *, that J. S. has a better title to the lands than the tenant in possession, and makes no pretence of title in himself, an action lies, if special damage follow from the words.

It has frequently been held, that not only a general assertion of title in the defendant is justifiable, but that a specific ground of claim, as under a lease, is likewise justifiable, though the party knew he had no such lease. So † that if B. published that he had a lease of Blackacre for one thousand years, he would not be subject to an action for slander, though he had no such lease, since it is his own title; but the reason and principle of these decisions appear very dubious, for though it may be inconvenient to render a claimant liable to all the consequences of his claim when *bonâ fide* made, the inconvenience does not extend to the case of a defendant, who asserts a fact in support of his title which he knows to be false. And such a doctrine seems directly contradicted by the case of Sir G. Gerard v. Dickenson‡.

The plaintiff there declared, that he was seised of the manor and castle of H. by purchase from Lord Audley, and that he was about to demise the castle and manor of H. to Ralph Egerton for a

* Jenk. 247. pl. 37.

† Jenk. 247. Cro. E. 34. Mo. 144. Mo. 188. 410. Roll. Rep. 409. 4 Rep. 18. Yel. 89. Cro. Car. 140. Cro. J. 397, 398. 485. 1 Roll. Rep. 244. 3 Buls. 75. Pal. 529.

‡ 4 Rep. 18. Cro. Eliz. 197.

term of twenty-two years; that the defendant said, "I have a lease of the castle and manor of H. for ninety years," and then and there shewed and published a demise, supposed to be made by George Lord Audley, grandfather to the said Lord Audley, for ninety years, to Edward Dickenson her husband, and published the said demise as a good and true lease, when, in fact, the lease was counterfeited by her husband, and the defendant *knew it to be counterfeited;* by reason of which words, the said R. E. did not proceed to accept the plaintiff's lease. The defendant, in her plea, denied her knowledge of the forgery; and the plaintiff demurred. And it was resolved,

1. That if the defendant had affirmed and published that the plaintiff had no right to the castle and manor of H., but that she herself had right to them, in that case, because the defendant herself pretended right to them, although in truth she had none, no action would lie.

2. That the declaration was maintainable, because it was alleged that the lease was forged and counterfeited; and yet she, against her knowledge, affirmed and published that it was a good and true lease, and that she knew of the plaintiff's communication with R. E. to let him the land.

From this case it appears clear, that the extrajudicial assertion of a specific fact, against the knowledge of the party, thereby claiming title, will not avail as a justification. On the contrary,

so much strictness has been required in case of such justifications, that where the defendant had said, "I know one* who hath two leases of his (the plaintiff's) land, who will not part with them at any reasonable rate." It was held, that the shewing two leases to have been made to the defendant himself was not sufficient.

From the first resolution in Gerard v. Dickenson, it seems to have been held, that a *general claim of title* would, at all events, have been justifiable; yet, when a defendant, for the mere purpose of vexation, and knowing that he has no ground or colour of claim, prevents, by his false assertion, the selling or letting an estate, it seems to make no difference in principle, whether he effects the mischief by a *general claim*, or by the alleging a specific false fact. The distinction made in the two resolutions has been since materially contradicted—the more intelligible rule was laid down in the case of Goulding v. Herring †, where it was agreed, that though the defendant claims title, yet if it be found to be done *maliciously*, the action lies; but if, upon evidence, any *probable cause of claim* appears, it ought not to be found maliciously. And according to Rolle, C. J.‡ "If I have *colour* of title to land, and I say to ano-

* 1 Vin. Abr. 551. pl. 11. Cro. Eliz. 427.

† 3 Keb. 141.

‡ Sty. 414.

ther, I have better title to the land than you, yet an action will not lie against me, though my title be not so good as the title of the other is."

In the case of Smith v. Spooner*; where the owner of a house had prevented the plaintiff, his lessee for years, from disposing of the remainder of his term, by falsely asserting that he had *no title;* the court, after a verdict for the plaintiff, refused a rule to shew cause why there should not be a new trial. Lord Ellenborough†, C. J. observing, "The circumstances of the defendant's title and interest may rebut the implication of *malice,* but here it was left to the jury to say whether there was malice or not."

But where an attorney to a creditor‡, who had previously committed an act of bankruptcy, stopt the sale of an estate previously mortgaged and assigned to the plaintiff, by declaring the creditor's bankruptcy, and that a docket had been made out for a commission; it turned out that an act of bankruptcy had been committed, but that no commission had been sued out. On action brought, it was held, that in order to support it, there should be proof of malice, either express or implied; that if the defendant acted *bona fide,* and told the truth, he did no more than his duty; and though he went beyond what was strictly true, still, if

* K. B. Mich. 1811.

† Mich. Term. 1811.

‡ Hargreave v. Le Breton, Burr. 2422.

there was no material variance, and no difference made with respect to the plaintiff's title, the action was not maintainable.

So a person acting in the course of his professional duty, is entitled to the beneficial presumption arising out of his situation and the *interest* with which he is vested, till the malicious intention be proved.

The plaintiff* brought an action against the defendant for these words, "He was arraigned and convicted of felony." The defendant pleaded, that the plaintiff at another time brought false imprisonment against J. S., one of the serjeants of London, who justified by warrant from Sir N. Moseley, mayor of London, for arresting him, to find sureties for the good behaviour, and they were thereupon at issue, and found against the plaintiff, who thereupon brought an attaint. And that the defendant, being *consiliarius et peritus in lege*, was retained to be of counsel with the petty jury, and in evidence at the trial in London, spake those words in the declaration; and Yelverton, and Coke, attorney-general, being of counsel for the defendant, the court resolved that the justification was good; for a counsellor in law retained, hath a privilege to enforce any thing which is informed unto him for his client, and to give it in evidence, it being *pertinent to the matter in question*, and not to examine whether it be true or false; but it is

* Brook v. Sir Henry Montague, Cro. J. 90.

at the peril of him who informs it, for a counsellor is, at his peril, to give in evidence that which his client informs him, being pertinent to the matter in question; otherwise, action on the case lies against him by his client, as Popham said, but matter not pertinent to the issue or the matter in question he need not deliver, for *he is to discern in his discretion* what he is to deliver, and what not; and although it be false, he is excusable, being pertinent to the matter. But if he give in evidence any thing *not material* to the issue, which is scandalous, he ought to aver it to be true, otherwise he is punishable; for it shall be intended as spoken maliciously, and without cause, which is a ground for an action. So, if a counsellor object matter against a witness which is slanderous, if there be cause to discredit his testimony, and it be pertinent to the matter in question, it is justifiable what he delivers by information, though it be false. So, where it is material evidence to prove him a person fit to be bound to his good behaviour, and in maintenance of the first verdict: therefore his justification is good.

And Coke cited a case*, where a clergyman, in his sermon, recited as a story out of Fox's Martyrologie, that one Greenwood, being a perjured person and a great persecutor, had great plagues inflicted on him, and was killed by the hand of God; whereas, in truth, he never was so plagued, and

* Cro. Jac. 90.

was himself present at that sermon. And he thereupon brought his action upon the case, for calling him a perjured person, and the defendant pleaded not guilty; and this matter being disclosed upon the evidence, Wray, C. J. delivered the law to the jury: that it being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously, and so was found not guilty *.

And Popham affirmed it to be good law, when he delivers matter after his occasion as matter of story, and not with any intent to slander any. Wherefore, for these reasons, it was adjudged for the defendant.

These two cases afford an apt illustration of this branch of the law; and the former points out, with great precision, both the duty and liability of a professional advocate.

Where the facts asserted are pertinent to the cause, and suggested by the client, the presumption of law will be, that what the advocate asserts is said out of regard to the interests of his client; but when he travels out of his way, and abuses the situation in which he stands by charges and invectives either not relating to the cause in hand, or, if pertinent to the issue, not suggested by those from whom he is bound to receive information, he forfeits his privilege, and is liable to answer

* He cited 14 H. 7. 14. 20 H. 6. 34.

for the false charges he has made in his private individual capacity.

In an action * for a libel on the plaintiff, in his profession as a solicitor, the libel, as set out in the declaration, was contained in a letter written by the defendant to Messrs. Wright and Co. bankers at Nottingham, and charged the plaintiff with improper conduct in the management of his concerns. It appeared, however, upon the trial, that the letter was intended as a confidential communication to those gentlemen, and that the defendant himself was *interested* in the affairs which he supposed to be mismanaged by the plaintiff. After the cause had been opened by the plaintiff's counsel,

Lord Ellenborough, C. J. said, if the letter had been written by the defendant confidentially, and under an impression that its statements were well founded, he was clearly of opinion that no action could be maintained. It was impossible to say that the defendant had maliciously published a libel to aggrieve the plaintiff, if he was acting *bona fide* with a view to the *interests of himself* and the persons whom he addressed; and if a communication of this sort, which was not meant to go beyond those immediately *interested* in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted. His

* M'Dougall v. Claridge, 1 C. N. P. 267.

Lordship referred to the case of Cleaver v. Sarraude, tried on the northern circuit while he was at the bar: where, in an action like the present, it appeared that the letter had been written confidentially to the Bishop of Durham, who employed the plaintiff, as steward to his estates, to inform him of certain supposed malpractices on the part of the plaintiff; upon which the Judge, who presided, declared himself of opinion that the action was not maintainable, as the defendant had been acting *bona fide*, and the nonsuit, which he directed, had been acquiesced in from a conviction entertained by the plaintiff's counsel of its being founded in law.

The Attorney-general, for the defendant, said, that his client, at the time of writing the letter, was certainly impressed with a belief of the truth of the charges it contained, but had since seen reason to believe they were groundless; he therefore consented to withdraw a juror.

So, where the person *to whom* the communication is made is interested, as in the case of Cleaver v. Sarraude above quoted no action is maintainable without proof of express malice.

In the case of Dunman v. Bigg *, the plaintiff was a dealer in beer, buying it of a brewer, and selling it to publicans. Wishing to open an account with the defendant, a brewer, one Leigh became

* Sittings in London after T. T. 48 G. 3. Camp. R. 269.

his surety for the price of such quantities of beer as should, from time to time, be supplied to him, the defendant promising to inform Leigh of any default in his payments made by the plaintiff.

After the parties had dealt together for some time, the defendant went to Leigh, and spoke to him in very opprobrious terms of the plaintiff, saying, that he wished to cheat him, that he had sent back as unmerchantable, beer which he himself had adulterated, that he was a rogue and a rascal, &c. At this period there was a sum of money due from the plaintiff to the defendant in respect of the beer, for which Leigh had given a guarantee. Lord Ellenborough, C. J. said, "I am inclined to think that this was a privileged communication. Had the defendant gone to any other man, and uttered these words of the plaintiff, they certainly would have been actionable; but Leigh, to whom they were addressed, was guarantee for the plaintiff, and the defendant had promised to acquaint him when any arrears were due. He therefore had a right to state to Leigh what he really thought of the plaintiff's conduct in their mutual dealings; and even if the representations which he made were intemperate and unfounded, still, if he really believed them at the time, he cannot be said to have acted maliciously, and with an intent to defame the plaintiff. To be sure, he could not lawfully, under *colour and pretence* of a confidential communication, destroy the plaintiff's character, and injure his cre-

dit, but it must have the most dangerous effects if the communications of business are to be beset with actions of slander. In this case, the defendant seems to have been betrayed by passion into some unwarrantable expressions; I will therefore not nonsuit the plaintiff, and it will be for the jury to say, whether these expressions were used with a malicious intention of defaming the plaintiff, or with good faith to communicate facts to the surety which he was interested to know*.

* The parties agreed to withdraw a juror.—For further illustrations of this division of the subject, see R. v. Enes, Andr. 229. Lord Mordington's case, R. v. Jennaant, 3 Bac. Abr. 452. and R. v. Bailey, Andr. 229.

CHAPTER XIII.

Where a Person repeats the Slander invented by another.

A PERSON repeating the slander which he has heard from another, will, in some instances, be justified, provided he, at the time of repetition, declare the name of the person from whom he heard it.

This defence is, however, liable to be rebutted, by proof that the defendant knew, at the time of publication, that the slander was without foundation.

The doctrine of justification by hearsay seems to have been first settled in the Earl of Northampton's case *, which was upon an information in the Star Chamber for scandalum magnatum; and the resolution contained in that case has a plain reference to the rule contained in the statute 1 Westminster, which enacts, that the propagator of slander, concerning the grandees of the realm, shall be imprisoned until he give up the author. The resolution was, that "if A. say to B. 'Did you not hear that C. was guilty of treason'?" This is tantamount to a scandalous publication.

* 12 Rep.

"And, in a private action for slander of a common person, if J. S. publish that he hath heard J. N. say, that J. G. was a traitor or thief, in an action on the case, if the truth be so, he may justify; but if J. S. publish that he hath heard generally, *without a certain author*, that J. G. was a traitor or thief, there an action *sur le case* lieth against J. S. for this, that he hath not given to the party grieved any cause of action against any, but against himself, who published the words, although that in truth he might hear them, for otherwise this might tend to the great slander of an innocent person; for, if one who hath *læsam phantasiam*, or who is a drunkard, or of no estimation, speak scandalous words, if it should be lawful for a man of credit to repeat them generally, without mentioning the author, that would give greater colour and probability that they were true, in respect of the credit of the repeater, than if the author himself should be mentioned *."

In Crawford v. Middleton †, it was held, that it was necessary for the plaintiff to negative the fact of the defendant's having heard the words which he pretended to repeat as spoken by another. But in the case of Woolnoth v. Meadows ‡, where a similar objection was taken, it was said by the

* The court referred to 33 & 34 Ed. 1. and 30 Ass. pl. 10. in the Exchequer. Mich. 18 Ed. 1. Rot. 4.

† 1 Lev. 82.

‡ 5 East, 463.

court, that Lord Northampton's case was a complete answer to it.

Since the consideration of the indemnity consists in the giving the plaintiff a certain cause of action against a prior propagator of the slander, if the disclosure made fall short of supplying a certain cause of action, it will not avail as a justification.

The defendant* speaking to the plaintiff, who was a tailor, said, "I heard you were run away." The defendant pleaded, that before the speaking of the words, he had heard and been told by one D. Morris, that the plaintiff had run away, for which reason he spoke the words.

Lord Kenyon, C. J. in giving judgment for the plaintiff on demurrer, said, "Whether this be considered on the authorities, or on the reason of the case, the justification cannot be supported. The Earl of Northampton's case is precisely in point. If a person say, that such a particular man, naming him, told him a certain slander, and that man, in fact, did tell him so, it is a good defence to an action to be brought by the person of whom the slander was spoken; but if he assert that slander generally, and without adding who told it him, it is actionable. Then it is said, it is sufficient to repel such action, to disclose, by the defendant's plea, the person who told him that slander; but that is clearly no justification;

* Davis v. Lewis, 7 T. R. 17.

after putting the plaintiff to the expense of bringing the action, he can only impute the slander to the person who utters it, if the latter do not mention the person from whom he heard it. The justice of the case also falls in with the decisions on the subject. It is just, that when a person repeats any slander against another, he should, at the same time, declare from whom he heard it, in order that the party injured may sue the author of the slander.

So*, where the defendant said of the plaintiff, who had been proposed as a volunteer for the defence of the country, "His (the plaintiff's) character is infamous, he would be disgraceful to any society. Whoever proposed him must have intended it as an insult. I will pursue him, and hunt him from all society. If his name is enrolled in the Royal Academy, I will cause it to be erased, and will not leave a stone unturned to publish his shame and infamy. Delicacy forbids me from bringing a direct charge, but it was a male child of nine years old who complained to me." The defendant justified, averring that a male child of the name of A. B., of the age stated, did complain to the defendant of an unnatural crime before that time committed by the plaintiff upon such male child. Upon demurrer, it was observed by the Court, that slanderous words can in no case be

* Woolnoth v. Meadows, 5 East, 463.

justified upon the report of another, unless the name of the original slanderer be given at the time; that it is not sufficient to disclose the name for the first time in the defendant's plea; that the object of the rule is to give the injured person *a certain cause of action against some one.* But that, in the principal case, no action could have been maintained on those words against the boy; whereas, if the defendant had named the boy at the time, and repeated truly what he had said to him, the plaintiff would have had his action against the boy.

And for the same reason, the repeater of slander must give the very words used by the author; for the plaintiff, to maintain his action, must state the very words used by the defendant, and prove them as stated; so that, unless the defendant faithfully repeat the original slander, the plaintiff will not be put in possession of a certain cause of action.

The defendant *, in a written affidavit, deposed to words spoken by a third person concerning the plaintiffs, who were merchants; and, after stating the words used by the third person, added, "or words to that purport and effect." The defendants justified, stating, that they did hear the third person publicly declare to the effect following; and then proceeded to state the communication deposed to, on which the action had been brought. To

* 2 East. 425.

this justification the plaintiff demurred upon several grounds; and the court, in giving judgment for the plaintiffs, observed, that "at all events, in order to justify the parties reviving the slander by naming the original author of it, they must so disclose the matter as to give the plaintiff a certain cause of action against the party named. Now here they only state that the other uttered such words, or *to that effect*; and if the defendants, when called as witnesses to support the action against the author could only prove that he uttered words to *the effect* of those set forth, that would not be sufficient."

From these cases it appears to be the general rule of law, that no action is maintainable against a person who repeats the slander of another, announcing at the same time the name of his author, and the identical words by which such slander was first communicated, so as to afford the plaintiff a good ground of action. The principle on which this exemption rests is not very apparent. One reason for not allowing the action is, that the defendant has given the plaintiff a certain cause of action against a third person, from whom the whole damage sustained may be recovered. But it may frequently happen, that though the plaintiff may have a certain cause of action, he may be no nearer the actual recovery of a compensation. As, where the circumstances of the original author are indigent, his situation obscure, and the report derives

both its publicity and noxious quality chiefly from its having been circulated through the medium of another; in general, even the mere repetition of the slander without observation, carries with it some additional credit from the reporter.

In order to complete the ground-work of an action, there must be, as already frequently observed, a *damage* sustained, and a *wrong* so considered by the Law; whether the justification in the present instance arises from the want of the one or other, or both of these essentials, it may not be easy satisfactorily to determine; but since the conduct of a person who gives up the author of an injurious report, and enables the party calumniated to reach the author of the calumny, may be attributed to a good and friendly motive, that circumstance may operate to the defendant's advantage, though it does not seem, in strictness, to warrant any thing more than a *prima facie* presumption in his favour.

In Maitland and others * against Goldney and others, one ground of the plaintiff's action, as stated in the declaration, was, that the defendants had published the slander of another, well knowing that other to have retracted his opinion of the plaintiffs, and to have confessed his error. Upon demurrer, it was not argued for the defendants that an action does not lie for publishing slander origi-

* 2 East, 425.

nally uttered by another, after knowledge by the defendant that it was untrue, but an objection was taken to the mode of pleading.

In giving judgment on demurrer, it was observed by Ld. Ellenborough, C. J. that "In order to maintain this species of action, it is necessary that there should be *malice* in the defendant, and an *injury* to the plaintiff, and that the words should be untrue. By the first count, the charge in substance against the defendants is, that they revived and published an injurious report of the plaintiff which had been made by another person, who was afterwards convinced that he had uttered the words hastily and rashly, and that the defendants did this with a full knowledge of all those circumstances. All the several allegations of the previous reports, the subsequent explanation of the plaintiff's conduct to Guy*, his satisfaction with it, and the defendant's knowledge of it, are so interwoven by the pleading with the publication of the libel, that they could not be severed from it; so that the plaintiffs could not sustain that count by proof of the publication alone, without such explanatory circumstances. The plaintiffs could not entitle themselves to recover unless all were proved. The count then contains a charge against the defendant, that they published the slander with a *knowledge* that the person who had originally un-

* The author of the slander.

tered it was satisfied that it was untrue. The fact, therefore, of such previous uttering, was merely used by the defendants as a *pretence* for publishing the same slander, that shews *malice* in the defendants, and an *injury* to the plaintiffs." Judgment was, however, given for the plaintiffs, not on the ground of legal malice being attributable to the defendants, but because they had repeated the *effect of the slander*, and not the very words.

In the case of Gerrard v. Dickenson *, it was held, that slander spoken by the defendant against his own knowledge, made him liable at all events, and deprived him of the benefit of his justification.

It is difficult to carry the principle of exculpation in this case further than this: that a person who, *bona fide*, repeats the scandal of another for the purpose of enabling the plaintiff to obtain redress, shall not be liable to an action; but neither principle nor precedent warrant the repeating slander of another which the repeater *knows to be without foundation*, for the mere purpose of vexation to the plaintiff. On the contrary, the defendant's conduct is pregnant with malice, and therefore, when attended with detriment to the plaintiff, furnishes the two great essentials necessary to support an action. And upon this ground it should

* 4 Coke, 18. b.

seem, that if the defendant, by the use of more forcible terms, or by reducing the slander to writing or print, render its quality more injurious, he thereby forfeits his pretension to the friendly character, under the sanction of which he might otherwise have justified.

It follows, by way of corollary to the general proposition above laid down, that if the slander has been circulated by a number of tongues, the last repeater, to protect himself, must mention the names of all his predecessors in the scandal with which he is acquainted; so that, if A. invent the slander, which is transmitted through B. and C. to D. the last must mention the names of C. B. and A., if communicated to him; for if he were to mention the name of C. only, on an action brought against C., he might justify as having given up his author B. to D., by which means the plaintiff would be barred of his action against C., and therefore might proceed against D.

Under this division also may be classed all those cases in which the defendant has acted in a friendly character to the plaintiff, in attempting to reclaim him from any real or supposed vices, as by expostulation in a private letter, or by writing to a father or other relation or guardian, to acquaint him with the faults of those in whose welfare he has an interest, for the purpose of their reformation. Since these are acts of friendship, intended for the benefit of the party, and not with a

malicious view to wound his feelings or defame him, they are not considered by the law as libellous*; but this presumption is in all cases liable to be rebutted by evidence, shewing that the character of a friend was assumed for the purpose of defamation.

* 2 Brownl. 151, 152. 2 Burn's Eccl. Law, 779. 3 Bac. Ab. 412.

CHAPTER XIV.

Where the Defendant gives the Character of a Servant, &c.

AND next, the benefit of this *prima facie* presumption extends to all who appear to act in the discharge of any duty which the convenience or exigencies of society call upon them to perform.

Where a master gives a character of a servant, unless the contrary be expressly proved, it will be presumed that the character was given without malice *.

An action was brought † by the plaintiff for publishing the following letter to one Collier, respecting the plaintiff's character as a servant: " Two days I gave him money to go into the city and buy books. When he came home, I desired him to reckon up his account; he did so. But being one day more curious than I sometimes was, I looked over his account, article by article; and in one book I well knew the price of, I found he had charged me one shilling more than it cost, and that shilling he kept in his pocket. The next day, the very same affair; and both these days my neighbour Metcalf was in my shop, and knows it well,

* Burr. 2425. B. N. P. Edmondson v. Stephenson, 8.

† Weatherstone v. Hawkins, 1 T. R. 110.

and said he would not keep such a man a day, or something to that purpose. Two magazines he charged two shillings for binding, the people received no more than 1s. 8d.; and this I can prove." A verdict was found for the plaintiff on one of the counts of the declaration, containing the above letter, subject to the opinion of the count on the following case:

The plaintiff was brother-in-law to Mr. Collier; he was in the service of the defendant, and was by him turned away. Rogers, to whom the plaintiff was recommended to be taken as a servant, applied to the defendant for a character, which not being advantageous, but to the effect stated in the declaration, he (Rogers) did not take him. Collier, upon this, repeatedly called upon the defendant, upon which the letter stated in the declaration was written, with an intent to prevent an action by the plaintiff for the words spoken by the defendant to Rogers. The writ was sued out on the very day the letter was written.

The question for the opinion of the court is, whether this action lies.

Lord Mansfield, C. J. "I have held more than once, that an action will not lie by a servant against his former master, for words spoken by him in giving a character of the servant."

The general rules are laid down as Mr. Wood (the plaintiff's counsel) has stated; but to every libel there may be a necessary or implied justifica-

tion from the occasion, so that what, taken abstractedly, would be a publication, may, from the occasion, prove to be none, as if it were read in a judicial proceeding. Words may also be justified on account of their subject matter, or other circumstances. In this case, instead of the plaintiffs shewing it to be false and malicious, it appears to be incident to the application by Rogers to the master of the servant; and the letter was written to the brother-in-law of the plaintiff, for the express purpose of preventing an action being brought."

Buller, J. "This is an exception to the general rule, on account of the occasion of writing the letter. Then it is incumbent on the plaintiff to prove *the falsehood of it:* and in actions of this kind, unless he can prove the words to be *malicious* as well as *false*, they are not actionable."

Judgment for the defendant.

In the case of Rogers v. Sir Gervase Clifton, Bart.* the following facts appeared in evidence. The plaintiff having been hired as a servant by the defendant, lived about six months in his service, when the latter turned him away without giving him a month's warning; in consequence whereof, the plaintiff, conceiving himself entitled to a month's wages, refused to quit the service without being paid that sum. On this refusal, the defendant procured an officer from the public

* 8 E. & P. 587.

office to put the plaintiff out of the house, and employed his attorney to settle his wages with him. Immediately after this, the defendant, who was going into the country, called on Mr. Holland, with whom the plaintiff had previously lived, to inform him that the plaintiff had behaved in an impertinent and scandalous manner, that he the defendant had discharged him from his service, when the plaintiff refused to go without a month's wages; and he therefore desired Mr. Holland not to give him another character. While the plaintiff was in the country, he offered himself to a Mr. Hand, stating that he had lived with the defendant. Upon which, Mr. Hand wrote to the defendant for a character, and received the following answer:

"Sir,—In answer to your's, which came to hand yesterday, I beg leave to acquaint you, that Thomas Rogers did not live with me six months, as he has told you, and I wish I had never taken him into my house, as he is a bad-tempered, lazy, impertinent fellow, and has given me a great deal of trouble, as I was obliged to send an officer from the Marlborough-street Police Office to put him and his things out of my house, and also to employ Mr. Barnet, my attorney, of Soho-square, to settle his wages, as I look upon it he will take any advantage he can.

"I am, Sir, your most obedient humble servant,

"GERVASE CLIFTON."

Upon receipt of this letter, Mr. Hand refused to take the plaintiff into his service. It appeared that Mr. Holland never was applied to for a character of the plaintiff, after the communication made to him by the defendant; and Mr. Holland stated, that without such communication he should have declined giving another character to the plaintiff. The plaintiff also proved, by servants of the family, that while in the defendant's service he had conducted himself well, and that no complaints of the nature ascribed to him in the defendant's letter had all that time existed. The jury found a verdict for the plaintiff with £20 damages, but liberty was reserved to the defendant to have a nonsuit entered.

After the case had been argued, Lord Alvanley, C. J. said, " If it were to be understood, that whenever a master gives a bad character to a servant who has quitted his service, he may be forced by the servant, in justification of such his conduct as a master, to prove the particulars which he has stated respecting the servant, it would be impossible for any master, (so understanding the law, at least with any regard to his own safety) to give any character but the most favourable to a servant, and consequently impossible for a servant, not entitled to the most favourable character, to obtain any new place. In the two cases of Edmondson v. Stevenson*, and Weatherstone v. Hawkins†, the law upon

* B. N. P. 8. † 1 T. R. 110.

this subject appears to me to be laid down as clearly as can be wished. Unquestionably the master, who has given a bad character of a servant to persons inquiring after his character, is not bound to substantiate by proof what he has said; but it is equally clear, that the servant may, if he can, prove the character *to be false*, and the question between the master and servant will always, in such case, be, whether what the former has spoken concerning the latter, be malicious and defamatory. In this case, we are to consider whether the evidence adduced by the plaintiff was sufficient to be left to the jury." His lordship, after stating the evidence, proceeded to observe, that the circumstance of the plaintiff's refusal to quit his master's house till his wages had been paid, was the only act of impertinence proved against him; and that the defendant was not called upon by that single act to seek out Mr. Holland, and officiously to state what he did; that if a servant were strongly suspected of having committed a felony whilst in his master's service, it would be the master's duty to warn others from taking him into their service; but that, in the principal case, the offence imputed to the plaintiff appeared to be of a trivial nature. His Lordship concluded by saying, that he should have grievously invaded the province of a jury, had he not left it to them to say whether, considering all the circumstances of the case, the defendant's con-

duct was not malicious, and that he did not consider himself at liberty to disturb the verdict they had given.

Rooke, J. was of the same opinion, and wished it to be understood as his opinion, that a master may at any time, *whether asked or not*, speak of the character of his servant, provided that he speak in the honesty of his heart; and that an action cannot be maintained against him for so doing; at the same time, masters are not warranted in speaking ill of their servants from heat and passion.

Chambre, J. referred to the case of Lowry v. Aikenhead *, before Lord Mansfield. In that case, the rule laid down by Lord Mansfield was, "That where a person, intending to hire a servant, applies to a former master for a character, the master is not bound to prove the truth of the character he gives; for what he speaks of the servant he does not speak officiously, but only discloses that which rests in his knowledge alone; but that where a master speaks ill of a servant, without any previous application having been made to him there, he must plead and prove the truth of the character in justification.

And the rule was discharged.

It appears, therefore, fully established, that a servant, in an action against a former master, must prove express malice.

* Mich. 8 G. 3.

It seems to have been laid down generally by Lord Mansfield, in the case cited by Mr. Justice Chambre, that where a master, *unasked*, gives a bad character of a servant, he must justify as in other cases; and though Mr. J. Rooke seems to have expressed an opinion somewhat different, there can be no doubt that the manifestation of any forward and officious zeal on the part of a defendant, who, *uninvited*, gives a character to the prejudice of his former servant, would be a material guide to a jury in ascertaining his real motive.

Where a plaintiff, knowing the character which his master will give, procures it to be given for the sake of founding an action upon it, he will not be allowed to recover*.

So, in general, where the publication is made in support or furtherance of the interests of society, and not wantonly and invidiously for the gratification of private malice, the author is privileged.

The defendant †, who was serjeant in a volunteer corps, of which the plaintiff also was a member, represented to the committee, by whom the general business of the corps was conducted, that the plaintiff was an unfit and improper person to be permitted to continue a member of the corps.

The words charged in the declaration were, that the defendant had said that the plaintiff had been

* Per Lord Alvanley, 3 B. & P. 592.

† Barbaud v. Hookham, 5 Esp. R. 109.

the executioner of the King of France, and that he had clapped his hands, rejoicing at the event, adding, that France would then be one of the first countries in the world.

It appeared in evidence, that the plaintiff was a Frenchman, and that the defendant had not made use of the words publicly, but had communicated them to the officers of the corps, who constituted the committee for its regulation.

Lord Ellenborough said, that it was not to be allowed that such an action could be sustained. It was a communication made upon a most important matter for their consideration, whether foreigners, the natives of a country in open war with us, were to learn the use of arms in a country threatened to be invaded by that other. The action was most ill advised and improper.

In Johnson v. Evans*, the words were, "She is a thief, and tried to rob me of part of her wages." It appeared upon the trial, that the plaintiff had been servant to the defendant. Upon a dispute taking place, he discharged her, and some difference arising respecting the payment of her wages, he charged her with having attempted to cheat him respecting her wages, and spoke the words as laid; but the plaintiff failed in proving them to have been spoken at that time. Having, however, sent for a constable, in order to

* 3 Esp. R. 32.

take her into custody, he made use of the same words to the constable when he came, to whom he meant to have given her in charge, but which in fact he did not do. The constable proved the words as spoken; but it further appeared in the course of his evidence, that the words had been spoken by the defendant, addressed to him in his character of constable, and in the course of charge and complaint which the defendant made to him against the plaintiff.

Lord Eldon, C. J. said, that the evidence given of the speaking of the words laid in the declaration was not such as to induce him to direct the jury to find a verdict for the plaintiff. Words used in the course of a legal or judicial proceeding, however hard they might bear upon the party of whom they were used, were not such as would support an action for slander. In this case, they were spoken by the defendant under a belief of the fact, and when he was about to proceed legally to punish it, it would be a matter of *public inconvenience*, and operate to deter persons from preferring their complaints against offenders, if words spoken in the course of their giving charge of them, or preferring their complaint, should be deemed actionable.—Plaintiff nonsuited.

Still this, it seems, amounts to a prima facie defence only, liable to be overthrown by proof of express malice on the part of the defendant, as by shewing that he knew at the time that the charge

was false. In Smith v. Hodgkins *, the case was this. The plaintiff assaulted and beat the defendant on the highway. The defendant meeting a constable, requested him to take charge of the plaintiff; and the constable refusing to arrest the plaintiff unless the defendant would charge him with the commission of a felony, the defendant did so, and judgment was given on demurrer for the plaintiff; the court observing, that there was no ground for the charge of felony.

And where property has been actually stolen †, the defendant is not warranted in the communication of a suspicion, which in fact is unfounded, except for the purpose of legal inquiry.

Under this class of communications may not improperly be ranked those publications whose professed object is to discuss, for the information of the public, the merits of the literary productions of the day. The authors of these, in the detection and exposure of vicious principles and bad taste, have a most difficult and important public duty to discharge, and in return are privileged in the most unlimited exercise of their reasoning powers, and of their talents for wit or satire, so long as it is confined to its legitimate object, the merits of the work before them.

* Cro. Car. 276.

† Powel v. Plunket, Cro. Car. 52.

In the case of Sir John Carr v. Hood*, the plaintiff stated, in his declaration, that he had been the author of several productive publications called, &c. but that the defendant intending to expose him to contempt and ridicule, had published a malicious and defamatory libel concerning the said Sir John, entitled, "My Pocket-Book, or Hints for a righte merrie and conceited Tour, to be called, The Stranger in Ireland in 1805, by a Knight Errant." The same libel containing a malicious and defamatory print of and concerning the said Sir John and his books, called "Frontispiece," and entitled, "The Knight leaving Ireland with regret;" and representing, in the said print, a certain false, scandalous, malicious, defamatory, and ridiculous representation of the said Sir John in the form of a man of ludicrous and ridiculous appearance, holding a pocket-handkerchief to his face, and appearing to be weeping; and also a certain false, malicious, and ridiculous representation of a man of ludicrous and ridiculous appearance, following the representation of Sir John, representing a man loaded with and bending under the weight of three large books, one of them having the word *Baltic* printed on the back thereof, and a pocket handkerchief appearing to be held in one of the hands of the said representation of a man, and the corners thereof appearing to be held or

* 1 Camp. N. P. 354.

tied together as if containing something therein, with the printed word *Wardrobe* depending therefrom, for the purpose of rendering the said Sir John ridiculous, and thereby meaning that one copy of the said first-mentioned book of the said Sir John, and two copies of the book of the said Sir John secondly above-mentioned, were so heavy as to cause a man to bend under the weight thereof; and that his the said Sir John's wardrobe was very small, and capable of being contained in one pocket-handkerchief." The declaration concluded by laying, as special damage, that Sir John had been prevented from selling to Sir Richard Phillips, for £600, the copyright of a book of which the said Sir John was the author, containing an account of a tour of the said Sir John through part of Scotland.

Lord Ellenborough, as the trial was proceeding, intimated an opinion, that if the book published by the defendant only ridiculed the plaintiff *as an author*, the action could not be maintained.

Garrow, for the plaintiff, allowed, that when his client came forward as an author, he subjected himself to the criticism of all who might be disposed to discuss the merits of his works, but that criticism must be fair and liberal; its object ought to be to enlighten the public, and to guard them against the supposed bad tendency of a particular publication presented to them, not to wound the feelings and ruin the prospects of an

individual; if ridicule was employed, it should have some bounds. While a liberty was granted of analyzing literary productions, and pointing out their defects, still he must be considered as a libeller, whose only object was to hold up an author to the laughter and contempt of mankind. A man with a wen upon his neck perhaps could not complain if a surgeon, in a scientific work, should minutely describe it, and consider its nature and the means of dispersing it; but surely he might support an action for damages against any one who should publish a book to make him ridiculous on account of his infirmity, with a caricature print as a frontispiece. The object of the book published by the defendant clearly was, by means of immoderate ridicule, to prevent the sale of the plaintiff's works, and entirely to destroy him as an author. In the late case of Tabart v. Tipper*, his lordship had held, that a publication by no means so offensive or prejudicial to the object of it, was libellous and actionable.

Lord Ellenborough. "In that case, the defendant had falsely accused the plaintiff of publishing what he had never published; here the supposed libel has only attacked those works of which Sir John Carr is the avowed author; and one writer, in exposing the follies and errors of another, may make use of ridicule, however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary inte-

* Vid. p. 271.

rests of the person ridiculed suffer, it is *damnum absque injuria*. Where is the liberty of the press, if an action can be maintained on such principles? Perhaps the plaintiff's Tour through Ireland is now unsaleable, but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer, after he had been refuted by Mr. Locke? But shall it be said, that he might have sustained an action for defamation against that great philosopher, who was labouring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works; they should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise, the first who writes a book on any subject will obtain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on *personal character* is another thing. Shew me an attack on the moral character of the plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule."

The Counsel for the plaintiff still complaining of the unfairness of this publication, and particularly of the print affixed to it, the trial proceeded.

the article complained of; whether he meant to put down a nuisance to public morals, or to prejudice the plaintiff. To ascertain this, it is material to know the general nature of the defendant's publications to which the libel alludes, and I therefore think that the evidence is receivable. The plaintiff is bound to shew that the defendant was actuated by malice, and the defendant discharges himself by proving the contrary. Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necesssary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel, which has for its object not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."

But in the same case it appeared that the libel falsely imputed to the plaintiff the publication of some silly verses of an improper tendency, which were specified in the libel, and set forth in the information; and it was allowed on the part of the defendant, that the plaintiff had not published them, but it was contended that they were a fair specimen of his publications.

Lord Ellenborough, however, informed the jury, that it was certainly actionable, gravely to impute to a bookseller having published a poem of this sort,

to which he was a stranger; as the evident tendency of the unfounded imputation was to hurt him in his business.

In the case of Heriot v. Stuart*, it was held that no action was maintainable for asserting in a newspaper that another public paper was the most vulgar, ignorant, and scurrilous journal ever published in Great Britain. But subsequent words, alleging that it was the lowest paper in circulation, were deemed actionable, since they affected the sale and the profits to be made by advertising.

In the case of Dibdin v. Bostock †, which was an action for publishing a paragraph in a newspaper, stating that the songs at a place of public entertainment were not of the plaintiff's composition, as they professed to be, and representing the performances as despicable, and as gaining no applause except from persons hired for the purpose. Lord Kenyon observed, "The editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment, but it must be done fairly, and without malice or view to injure or prejudice the proprietor in the eyes of the public; if so done, however severe the censure, the justice of it screens the editor from legal animadversion: but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, it is a libel, and actionable."

* 1 Esp. Rep. 437. † 1 Esp. R. 29.

CHAPTER XV.

Where the Defendant's Act is unexplained.

WHERE the mere naked words, unwarranted by the situation of the publisher, or the occasion of the publication, constitute the only circumstance from which the motive of the party using them can be inferred*, the law necessarily collects an evil intention from the mischievous tendency of the act, and in the absence of a justifiable cause, supposes the defendant to have had that end in view to which the means used were adapted, namely, the injury to the plaintiff's character or property.

The presumption is, however, nothing more than a rule of evidence†, that malice shall be inferred from the unexplained act of the defendant; an inference which is, nevertheless, liable to be rebutted by evidence shewing that no malice really existed.

The plaintiff brought an action against one, for saying of him that he heard he was hanged for stealing of an horse; and, upon the evidence, it appeared that the words were spoken in grief and

* See Lord Mansfield's opinion, in K. v. Woodfall, and K. v. Almon, 5 Burr.

† The King v. Lord Abingdon, 1 Esp. Rep. 226.

sorrow for the news. Twysden, J. cited this as a case which he heard tried before Hobart, J. who nonsuited the plaintiff, because the words were not spoken maliciously. And all the court agreed that this was done according to law *.

In the King v. Lord Abingdon †, Lord Kenyon observed, "In order to constitute a libel, the *mind must be* in fault, and shew a malicious intention to defame; for, if published *inadvertently*, it would not be a libel; but where a libellous publication is *unexplained by any evidence*, the jury should judge from the overt act; and where the publication contains a charge slanderous in its nature, should from thence infer that the publication was malicious.

And a wanton disregard of the feelings and interests of others, is, in point of law as well as morality, equivalent to express malice; so that it is no defence for the publisher of a libel to say that he was but in jest; for, as has been well observed by a learned writer, the mischief to the reputation of the party ‡ grieved is in no ways lessened by the merriment of him who makes so light of it; and it might, with equal regard to gravity and good sense, be contended, that a man who cuts the throat of another is not guilty of murder, because he takes a sanguinary delight in the opera-

* Lev. 82. Mich. 14 C. 2. B. R. 1 Vin. Abr. 540.
† 1 Esp. Rep. 228.
‡ Haw. Pl. C. c. 73.

tion; as, that a man's intentions are not wrongful and malicious when he destroys another's reputation, because the act* of destruction gives him pleasure.

Where a libel upon the character of an individual not intended to be published, is nevertheless, through negligence or accident, made public, to the detriment of the party, it seems that the act of the person who composed the libel would be in law a wrong, though the contents should ultimately become public through inadvertence, since he had no right, in the first instance, to trust the interests of another to chance, and render his character dependent upon accident; and therefore, by so doing, encumbered himself with at least the civil consequences which might afterwards ensue from an involuntary publication.

The legal principle upon which this responsibility is founded is clearly delivered in Mr. Buller's Law of Nisi Prius†. "Every man ought to take reasonable care that he does not injure his neighbour; therefore, whenever a man receives any hurt through the *default* of another, though the same were not wilful, yet, if it be occasioned by *negligence* or *folly*, the law gives him an action to recover damages for the injury so sustained."

This principle comprehends not only the in-

* 9 Co. 59. Moor, 627. Haw. P. C. c. 73. s. 14.
† B. N. P. 25.

stance just mentioned, where a writing not intended to be published, is divulged for want of proper care, but every case in which a noxious publication proceeds from mere levity or thoughtless jocularity; for though the actual intention to produce mischief might not at the moment actually influence the mind of the defendant, the act is attended with that criminal inattention to consequences which constitutes malice in its legal sense, and in justice renders the party responsible for the detriment so occasioned.

CHAPTER XVI.

Process.

NEXT are to be considered the means appointed by law for obtaining such damages where the party is entitled; and the means of defence where a party sues who is not so entitled.

The division of these proceedings is naturally suggested by the order in which they occur in point of time, and consist of, the process, pleadings, trial, judgment, and writs of error; to which may be added, the writ of prohibition.

Of the Process.—The action to recover damages for slander, whether oral or written, is a special action on the case; in which, since the damages are uncertain, the party cannot be held to bail without a special order of the court, or of a judge, on a full affidavit of the circumstances *, and no instance appears in the books in which such an order, in a common case, has been granted. Even in an action of scandalum magnatum, the court has denied an application for good bail; in the Marquis of Dorchester's case † the defendant agreed to put in bail to the amount of £50.

In the Earl of Macclesfield's case ‡, the plaintiff

* 1 Tidd. P. 150. ed. 4. † 2 Mod. 215.
‡ 3 Mod. 41.

desired that the defendant might put in special bail; but the court would not grant it, and said, it was a discretionary thing, and not to be demanded of right.

And it seems that the court will, in no case, allow special bail, unless affidavit be made of the words spoken*.

* 3 Mod. 44.

CHAPTER XVII.

Of the Venue.

IT is next to be considered what there is peculiar to the pleadings in an action for slander: Observations upon the declaration relate to the venue, the parties, the averments, and the joinder of different counts.

First, to the Venue.—In general, the venue in an action of this nature may be changed upon the usual affidavit, where that affidavit can be made with propriety. But where * a libel, written or printed in one county, is circulated in others, the court will not change the venue to the first; for, since every publication is a fresh offence, the defendant cannot swear that the cause of action was confined to any one county †.

But where a libel is written in one place, and sent to another in the same county, the court will change the venue ‡.

So, where the libel is written in one county and published in Germany, the defendant may change the venue, upon an affidavit that the cause

* Hoskins v. Ridgway, H. 23 G. 3. K. B. Pinkney v. Collins, 1 T. R. 571. 1 Wils. 178. 1 T. R. 647.

† Clissold v. Clissold, 1 T. R. 647. 1 Wils. 178.

‡ Freeman v. Norris, 3 T. R. 306.

of action arose in that county, and not elsewhere in this kingdom *.

And in the case of Freeman v. Norris †, the distinction was recognized between libels dispersed throughout the kingdom and those which are published in one county only.

So that, where the libel is printed in one county and published in a second, the venue, if laid in the second, cannot be changed; for the publication in the latter county, is the act of the defendant, and he cannot make the usual affidavit.

But the court will otherwise change the venue where special ground is laid.

As if the defendant cannot have a fair trial in the original county ‡.

But in an action for scandalum magnatum, it seems the venue cannot be changed upon the usual affidavit; and the reason assigned is, that the scandal raised of a peer of the realm reflects upon him throughout the kingdom §.

In the case of Lord Shaftesbury above alluded to, the venue was changed on the ground that the defendant could not have a fair trial in London where the venue was laid.

In the Marquis of Dorchester's case ‖, on a mo-

* 3 T. R. 652. Metcalf v. Murkham.

† 3 T. R. 306.

‡ Lord Shaftesbury's case, 1 Vent. 264.

§ Gil. C. P. 90.

‖ 2 Mod. 216.

tion to change the venue, which had been laid in London, Pemberton, Serj. shewed cause against the motion.

1st. Because the king was a party to the suit; for it is,

2dly. Because the plaintiff was a lord of parliament, where his services would be required. North, C. J. was of opinion that the venue could not be changed, since the proceeding was in the nature of an information. But Atkins, J. inclined to think that the venue might be changed; but the court not agreeing, the defendant consented that the cause should be tried in London, and the venue was not changed.

But it seems that generally, unless special ground be laid for changing it, the plaintiff in scandalum magnatum may retain his venue*.

Formerly, in actions for slander as well as in others, where a local justification was pleaded, the courts observed great nicety in requiring the venue to be awarded, not only from the county, but the very place in which the justification, as stated in the plea, arose. The reasons for this were, indeed, frequently stronger in these actions than in other instances, since where the truth of a criminal charge is pleaded in justification, the issue partakes of the nature of a criminal process; and it is said, that

* Duke of Norfolk v. Alderton, 2 Salk. 668. 1 Lev. 56. 307. 1 Vent. 364.

upon its being found against the plaintiff, he is liable to be tried by a petty jury without further inquest.

In the case of Ford v. Brooke *, which was an action for calling the plaintiff a perjured person at D. in Essex; the defendant justified, averring that the defendant had perjured himself at Westminster, in the county of Middlesex; the plaintiff replied, *de injuria*, &c. and the court awarded the venire to be directed to the sheriff of Middlesex.

So, in an action for calling the plaintiff a thief, at Dale in Essex, the defendant pleaded that the plaintiff had committed a robbery at Sale, in the same county; and issue being joined upon that fact, the court awarded the venire from Sale †. And a misdirection of the venire was a good ground for arresting or setting aside the judgment, though the court would, in such case, award a new venire. But the law upon this point is altered by the statutes 16. & 17. C. 2. c. 8. and 4 Ann, c. 16. s. 6.; the former of which enacts, that after verdict, no judgment shall be arrested or reversed, for that there is no right venue, so as the cause of action were tried by a jury of the proper county or place where the action was laid: and the latter directs that the venire shall be awarded

* Cro. Eliz. 261.

† Clerk v. James, Cro. Eliz. 870. See also Bowyer's case, Cro. Eliz.

out of the body of the county where such issue is triable*.

In Craft v. Boite †, the words were, "Look, there is a thievish young rogue, he hath stolen £200 worth of plate out of Wadham College," (meaning Wadham College, in the university of Oxford,) The plaintiff brought his action in London; the defendant justified the words, because he said that the plaintiff at Oxford, in the county of Oxford, stole certain plate out of Wadham College; the plaintiff pleaded *de injuria, &c.*; and the issue was tried in London, where the plaintiff had a verdict with £50 damages.

Saunders, for the plaintiff, moved in arrest of judgment, on the ground of the mistrial, but the court (against the opinion of Twisden) conceived that the fault was cured by the statute which had lately passed ‡. And this, which appears to be the first decision under the act, has since been acquiesced in.

* See Serj. Williams's note, 2 Saund. 5.

† 1 Saund. 241.

‡ 16 & 17 C. 2.

CHAPTER XVIII.

Of the Parties.

PARTIES.—First, as to the number of plaintiffs. In this species of action, as well as in other cases of tort, two or more may join where their joint interest has been affected by the act of the defendant*. So that, where a libel reflects upon two partners in their trade, they may join in the action †. But unless a joint interest be affected, several actions should be brought, though the same words be spoken or libel published concerning two. As, where A. says to B. and C., "You have murdered D.," B. and C. must bring several, and not joint actions ‡. So it seems, that two joint-tenants or coparceners may join in action of slander of their title to the estate: for, as it must be shewn in the declaration, and proved, that the plaintiffs received some particular damage by reason of the slander, the damage, even as well as their interest in the estate, is joint §.

So, for the words A. *or* B. murdered D., either

* Weller v. Baker, 2 Wils. 423. 2 Williams's Saund. 116. a. n. 2.

† Maitland v. Goldney, 2 East, 425. 3 Bos. and Pull. 150. Cook v. Batchelor, Shepp. Ac. 53.

‡ Cro. Car. 512. 28 H. 8. fol. 19. Dyer, Shepp. Ac. 53. Deacon's case.

§ 2 Will. Saund. 117. a.

A. or B. may bring a separate action *, but they cannot maintain a joint one †. Where ‡ joint actionable words are spoken of a husband and wife, the tort is several, and the husband alone may bring the action; but the wife may, in such case, be joined, provided the injury be laid as done to herself.

The case of words spoken of the wife admits of three varieties;

1st. When the words are not actionable, but attended with special damage.

2d. Actionable without special damage.

3d. Actionable with special damage.

In the first case, the damage resulting to the husband is the sole ground of action, and the wife must not be joined. As, where the action is brought for calling the wife a bawd, *per quod* the husband lost his customers §. And to join the the wife in such case would be bad on demurrer, in arrest of judgment, or in error.

But secondly, where the words are actionable, and no special damage laid, the wife must be joined, and the declaration conclude *ad damnum ipsorum*, for there the action survives; and she must be joined ¶ in an action for any slander published of her before her marriage.

* 10 Mod. 198. † 1 Roll. Ab. 81.

‡ Smith v. Croker, Cro. Car. 512.

§ 1 Lev. 140. B. N. P. 7.

‖ Grove v. Hurt, Tr. 35 G. 2. B. N. P. 7.

¶ 3 T. R. 627. 631. Com. Dig. Bar. & Fem. 1 Sid. 387. Ld. Ray. 1208. Roll. Ab. 347.

But thirdly, where the words spoken of the wife are actionable, and special damage has accrued in consequence to the husband, great perplexity has arisen on the question whether the wife should be joined or omitted. The difficulty in this case proceeds from the circumstance of two distinct causes of action being involved in one and the same transaction,—the actionable words spoken of the wife, and the special damage resulting to the husband. For the former, the husband is not entitled to damages without making his wife a party, and the cause of action survives to her. In the latter case, the loss is several, and peculiar to the husband, and ought not, therefore, to be stated as the loss of both. Accordingly, where the husband has brought the action alone, it has been contended that he ought to have joined his wife in respect of the actionable words spoken of her, that at all events the action would survive to her, and therefore that the defendant would twice make compensation for the same injury. And in similar cases, when the wife has been joined, it has been argued that the joint action was improper, since the special damage accrued.

From a review of the decisions upon this point, it appears, that the wife *is not barred* by the husband's action, though the special damage result from actionable words spoken of the wife, which removes the objection to a separate action, in which he alone is entitled to recover damages. In Guy

v. Livesey*, the husband alone recovered in an action of trespass for a personal injury to himself, and also for beating his wife, by means of which he lost her society for three days. And on motion in arrest of judgment, the court held, that the action was well brought; for the action was not brought *in respect of the harm done to the feme*, but for the particular loss of the husband, for that he lost the company of his wife, which was only a damage and loss to himself, for which he should have the action, as a master should have for the loss of his servant's service.

In Young v. Pridd†, the plaintiff brought trespass, for that the defendant assaulted, ill treated, and carried away his wife, and detained her for half a year, by means of which he lost the comfort and society which he should otherwise have had with his said wife. After verdict and judgment for the plaintiff, error was brought in the Exchequer Chamber, and assigned, that the husband had brought the action for the battery of the wife, which he could not do without his wife, and had recovered damages for the battery, and therefore that the judgment was erroneous. But all the Justices and Barons held, that the husband in that action *did not recover damages for the battery* of his wife, but for the loss which he had in wanting her company. That the *per quod consortium*

* Cro. Jac. 501. † Cro. Car. 89.

amisit and abduction of her were one entire conjoined cause of action, for which the damages were given. That for the battery, true it was that the wife ought to have joined to recover damages, and that the verdict and judgment *did not bar the wife from an action*, after the death of her husband, for the battery, or that she might join with her husband in another action. And judgment was affirmed.

In the case of Smith v. Hixon*, it was held that the husband alone might maintain an action for the malicious prosecution of the wife, by means of which he was put to expense. After verdict for the plaintiff, upon motion in arrest of judgment, grounded on the omission of the wife, the court said, that though the remedy for the scandal might survive to the wife, it was no objection to the husband's action, and that he might undoubtedly proceed for the battery of the wife, *per quod consortium amisit*, and yet the action for the beating would survive to the wife.

From these cases it appears, that the husband may separately maintain an action for the damage resulting to himself, from a personal injury offered to the wife, for which personal injury they might have maintained a joint action, and that the right of action would survive to the wife for the independent injury done to herself. The case of se-

* Str. 977. See also Hyde v. Scyssor, 8 Mod. 26. Cro. J. 220. Fort. 377. Cro. J. 664.

tionable words spoken of the wife, producing special damage to the husband, seems, in all respects, perfectly analogous to those cited; and on their authority it may be concluded, that a husband, for such words, or rather for the damage resulting from them, may sue without his wife. And it seems highly reasonable that the husband, in respect of the special damage, should be entitled to a separate action. In case the words had not been intrinsically actionable, the husband must have sued alone; and it can scarcely be contended that the injurious quality of the words can compel him to alter the nature of the proceeding, to recover for the separate tort to himself, the only alteration in the case consisting in the additional mischief to the wife. Since the injuries are completely distinct, there seems no reason why the remedies should not be equally independent. A contrary supposition would involve this absurdity, by the increased virulence of the words, the plaintiff would be placed in a worse situation as to his remedy, since, in case of actionable words, his title to damages would become dependent upon the life of his wife, and would be extinguished by her dying before judgment recovered.

There are, notwithstanding, several cases in which it has been held, that where there is a proper cause of action in the wife, though special circumstances are added which are actionable in the husband only, the declaration is good by husband

and wife, and the additional circumstances may be considered as mere matter of aggravation.

In Cookson and his wife v. Castline *, the plaintiff brought trespass for entering upon their land, making hay of their grass, and carrying it away. It was moved in arrest of judgment, that the action doth not lie by baron and feme for the hay taken, for it is a chattel severed from the inheritance, and vested in the baron, for which the feme shall not join with him in the action. But the clear opinion of the court was, that they may well join; for as they may join in trespass *de clauso fracto*, and cutting their grass, so they may join for the hay coming of it; and so it was adjudged. But Wray said, if it were for taking twenty loads of hay, without saying, coming of the same, it would be otherwise; for it might be intended of hay lying upon the land before, for which they cannot join.

But in the case of Arundell v. Short and his wife †, which occurred soon after, upon a judgment given in trespass, by baron and feme, of their close broken and corn carried away, it was assigned for error that the feme ought not to join, for she can have no property in the corn, and 48 Ed. 3. 18, and 9 Ed. 4. 52, were cited as in point. For the plaintiffs, Godfrey and Coke, argued, that it is in the election of the baron to join his wife in personal or

* Cro. Eliz. 96. † Cro. Eliz. 138.

tions, and it may be intended that they were joint tenants of the corn before coverture, or that the feme had it as executrix; and if the writ, by any intendment, may be good, it shall not abate. Gawdy, J. said, "the books agree, that for personal things they cannot join, but for personal things in action, it is in the election of the husband to join his wife or not." And the judgment was reversed.

In Russell v. Corne*. The husband and wife brought trespass and false imprisonment for the imprisonment of the wife, by means of which the domestic affairs of the husband remained undone, to the damage of both. After verdict for the plaintiff, it was moved in arrest of judgment, that the business of the husband remaining undone, could not be to the damage of the wife, and that for such damage, the husband ought to have brought the action alone. But it was answered, that the action being well brought and conceived for the imprisonment, what came under the *per quod* could only be taken in aggravation, as if words in themselves actionable be spoken of a wife, and the husband and wife bring the action, and conclude *per quod*, &c. the husband lost his customers, it would be well, for the words being in themselves actionable, the *per quod* should be taken in aggravation, all which the court allowed.

But Lee, C. J. is reported to have said, "In a manuscript note which I have seen of this case in

* 1 Salk. 119. Holt, R. 699. 6 Mod. 127.

Salkeld*, Holt, C. J. says, 'I will not intend that the judge suffered † the husband's business remaining undone to be given in evidence.'"

In Todd v. Redford ‡, the husband and wife brought a joint action against the defendant, for the assault and battery of the wife. The declaration set forth, that the defendant assaulted Eleanor the wife, and driving a coach over her, bruised her, &c. by means of which the husband laid out money for the cure, &c. After verdict for the plaintiffs, it was moved in arrest of judgment, that the husband and wife should not have joined, because the damage is laid to be for the money laid out in the cure of the wife, as well as for the battery, and that entire damages having been given, it was bad for the whole. On the other side, it was contended, that the tort was only to the wife, and the rest but consequential damage. That it was so held in Russell v. Corne; but, per Powell, J. where husband and wife join in an action of assault and battery for beating both, it is wrong, but it may be helped by a verdict separating the damages. Here the gist of the action is only the beating of the wife, and the *ratione inde* is but in aggravation of damages. The husband and wife cannot join in assault and battery, *per quod consortium amisit*; for the *per quod*, in such a case, is the gist of the

* 119.

† Str. 1094.

‡ 11 Mod. 264.

action; but in the case at bar, had the *ratione mali* been left out, the surgeon's bill might have been given in evidence in aggravation of damages. And judgment was given for the plaintiff.

In these and other cases where it has been held that the wife may join, though special damage be laid to the husband *, it has been said that action was well brought, because the special damage laid under the *per quod*, was merely in aggravation.

But it has frequently been decided, that those circumstances cannot be laid in aggravation for which a different appropriate action is maintainable. Thus, in trespass for entering the plaintiff's house, the beating his wife, child, or servant, may be stated in aggravation; but the plaintiff cannot recover damages for losing the service of his child or servant; because he is entitled to another action for that injury †.

So in trespass, for entering the plaintiff's house and assaulting him ‡, and for assaulting and menacing his servants and children, it was moved in arrest of judgment, that the master could not maintain trespass for beating and assaulting his servants

* 1 Salk. 119. 11 Mod. 264. Yel. 89. 1 Roll. Rep. 360. Holt, R. 699. 6 Mod. 127.

† Peake's Ca. Ni. Pri. 46. B. N. P. 89. 1 Sid. 325. Mod. 147. 2 Salk. 642. 3 Burr. 1078.

‡ Newman v. Smith, Salk. 642.

or children without special damage. But it was resolved, that the action was for the breaking and entry, and that the further description was only to shew the court how enormous that trespass was. That the plaintiff could not recover damages for losing the service of his children or servants, nor could that be given in evidence, because the plaintiff might have a proper action for that purpose.

In Dix v. Brooks *, the plaintiff declared that the defendant broke and entered his house, and assaulted his wife. After verdict, it was moved in arrest of judgment, that the wife should have joined; that by her not joining, the defendant pays damages to the husband, and yet that the action for the assault would survive to the wife, and so the defendant would be doubly charged. And besides that, there was no laying *per quod consortium amisit*, to entitle the baron only to sue, and to exclude the wife. But the Court said, "the plaintiff may join that in his declaration to aggravate damages, for which *he could not singly recover*, and the party injured have his separate action, as in the common case of beating a servant *per quod servitium amisit*, both master and servant may recover. And in the case of Newman v. Smith, it was held, that the plaintiff might allege the beating of his daughter in aggravation of damages."

* Str. 60.

By these cases, those of Russell and Corne, and Todd and Redford, appear to be much shaken; since the rule of policy which restrains a plaintiff from recovering in one action for an injury which ought to form the subject matter of a different and more appropriate action, applies with much more force to cases like the principal one, where different rights are affected, and another person ought to join.

Upon the whole, it seems perfectly clear, that where the words spoken of the wife are actionable, and also produce special damage to the husband, it is proper that he should sue alone for the special damage, and that the action for the slander would survive to the wife. On the other hand, since the special damage is the subject of a specific appropriate action by the husband alone, it seems improper to state it in an action brought by both; the defect, however, would be aided by a verdict, excluding the special prejudice, and confining the damages to the detriment * sustained by the wife.

* 2 Mod. 66. 2 Lev. 101. 1 Lev. 3. Com. Dig. Pleader, c. 87.

Next, as to the Joinder of different Defendants.

Where the wrongful act is the joint act of two or more, the plaintiff may proceed against them in one and the same action; as, where the slander is contained in affidavits made by two, but so connected as to form one slanderous charge *.

But where two persons speak the same words, the plaintiff must bring separate actions, for the acts are several in their nature, and the tort of one is not the tort of the other.

The defendants said to the plaintiff †, "Thou hast the plate of J. S., and we charge thee with that felony." After verdict for the plaintiff, in an action against both, judgment was arrested. And the case of an action for mere slander differs in this respect from an action for charging a plaintiff with felony, and procuring him to be indicted; for in the latter, the act of the defendants is joint, and the plaintiff may proceed against them in the same action ‡.

Though the husband and wife speak the same words, the plaintiff must bring different actions, and the court will not permit them to be consolidated, for it would be error to join the wife for words spoken by the husband only, and the declaration § would be ill either upon demurrer or in arrest of judgment.

* 2 East, 426. † Cro. Jac. 647. ‡ B. N. P. 5.

§ Swithen and his Wife v. Vincent and his Wife, 2 Wils. 227. Subly v. Mott, B. N. P. 5.

But where, in an action against husband and wife for speaking of the plaintiff certain scandalous words, the jury found the husband guilty, and the wife not guilty, the plaintiff had judgment; for though the action ought not to have been brought against both, and the declaration would have been held ill on demurrer, yet the verdict cures the error *.

* 1 Roll. Abr. 781. (o) pl. 1. Sty. 349. Com. Dig. Pleader, c. 87.

CHAPTER XIX.

Of the Averments.

THE declaration in this, as well as in every other action, consists of a clear and technical statement of the facts necessary to support the complainant's suit; so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment upon them *.

It has been in all times the fashion to preface the legal enunciation of the plaintiff's case with a preliminary panegyric upon his character; this is superfluous, since it does not affect the gist and essence of the action. A man of bad character is not to be represented as worse than he really is, and therefore is entitled to a compensation, to be measured by the excess of the scandal beyond what is really due to him. In one instance †, indeed, it appears that the plaintiff's announcing himself to be of *good fame*, tempted the defendant to plead,

* Cowp. 682. Com. Dig. Pleader, C. P. 17. Co. Litt. 383. 2 B. & P. 267.

† Strachey's case, Sty. 118.

that at the time of publishing the words the plaintiff was not of good fame; but the plea was holden to be bad, since it answered matter of inducement which did not require any answer.

In a late case, the plaintiff, in an action for a libel, imputing to him seditious principles, prefaced his declaration with a boast of the uniform loyalty of his conduct; it appeared that he had been some time in confinement under the sentence of the court, for publishing a seditious libel; and the Lord Chief Justice animadverted on the impropriety and absurdity of such a preamble.

It is necessary that the declaration should plainly and clearly exhibit the two circumstances whose concurrence is, as frequently observed, essential to the maintenance of the action.

1. The wrongful act of the defendant;

2. The damage sustained by the plaintiff; where it is not presumed by law from the act itself.

The wrongful act of the defendant consists in his having *published* that which is *illegal* concerning the *plaintiff*, with a *malicious* intention.

First, as to the act of publication.

It appears that a publication in effect must be stated, though no particular form of words is required. In the case of Baldwin v. Elphinstone*, it was assigned for error, that in the second count

* 2 Bl. R. 1037.

the defendant was charged with having *printed* the libel, and having caused it to be printed in the St. James's Chronicle, but was not charged with having *published* it. After argument in the Exchequer Chamber, the Justices and Barons were all of opinion that the judgment ought to be affirmed. That there are various modes of publication, and no technical words are necessary to describe it; that it is sufficient if there be stated in the declaration such matter as amounts to a publication without using the formal term published, and the Jury are upon the evidence to decide whether a publication be sufficiently proved or no. That, printing a libel may be an innocent act, but unless qualified by circumstances, shall *prima facie* be understood to be a publishing: it must be delivered to the compositor and other subordinate workmen. That printing in a *newspaper* admits no doubt upon the face of it. The court further observed, "It is stated that he caused to be printed. This confirms the fact of publication, because it calls in a third person as agent, to whom the libel must have been communicated. In short, the count does not state generally, as it might have done, that the libel was published, but it expresses the particular mode of publication, viz. in a newspaper. It thereby puts the publication in issue, and the jury have found it so."

It must be observed, that this was after verdict, which was relied upon by the Court, and

probably the declaration would have been considered as defective upon special demurrer, for not stating a publication in more explicit terms.

In this case, too, great stress was laid upon the circumstance that the defendant caused the libel to be printed in a *newspaper*, had the allegation been simply, that the defendant printed and caused to be printed the libel in question, it would have been difficult to have construed it into an averment that he published, since a man may print, and therefore cause to be printed, without the intervention of others.

The term *published* is the proper and technical word to be used in the case of libel, without reference to the precise degree in which the defendant has been instrumental to such publication; since, if he has intentionally lent his assistance to its existence for the purpose of being published, his instrumentality is evidence to shew a publication by him*.

In a declaration for words spoken, it is sufficient to aver that the defendant spoke the words in the presence † of divers persons, without alleging that those present either heard or understood them, and it will be intended that they did hear and understand the words till the contrary appear.

But it would be insufficient to aver that the

* Lamb's case, 9 Rep.

† Cro. E. 480. Noy, 57. Golds. 119. Cro. J. 39. Cro. Car. 199.

words were spoken, without stating them to have been spoken in the presence of some one *, or without some averment which necessarily implied a publication to a third person as that the defendant *palam et publice* † *promulgavit de querente.*

It has been doubted whether it be sufficient to lay the words to have been spoken under a *cumque etiam*, by way of recital ‡; but in the case of Mors v. Thacker §, it was decided, that such an allegation in an action on the case is good, though it would be otherwise in trespass.

But if the words be spoken in a foreign language, an averment is necessary that the hearers understood them ‖; and even when Welsh words were averred to have been spoken in Monmouthshire, which once was part of Wales, judgment was arrested after verdict for the plaintiff, because it was not averred that they were spoken before Welshmen, or those who understood the Welsh tongue ¶.

In the King v. Brereton **, the indictment stated that the defendant "*Scripsit fecit et publicavit, seu scribi fecit et publicari causavit.*" And judgment was arrested on account of the uncertainty of the

* Sty. 70.
† Cro. Eliz. 861.
‡ 2 Mod. 41. § 2 Lev. 163.
‖ Cro. E. 496. Cro. E. 865.
¶ Cro. Eliz. 865.
** 8 Mod. 328.

disjunctive charge; and in a civil proceeding such an averment would probably be considered defective, if pointed out on special demurrer.

Next it must appear that the publication contained *illegal matter*.

The words or signs are either intrinsically actionable, or derive their illegality from collateral circumstances; it is therefore necessary to inquire, in the first place, how the mere words themselves are to be stated and connected with the plaintiff; and secondly, where they are not in themselves actionable, how they are to be connected with the collateral facts from which their actionable quality is derived.

First, as to the statements of the mere words or signs; it has long been settled in both civil and criminal cases, that the declaration or indictment must profess to set out the very words published, and that it is not sufficient to describe them by their sense, substance, and effect.

It seems * formerly to have been held sufficient to set out the words, not in English as they were delivered, but in the Latin language; the permitting which clearly recognized the propriety of a substantial, in contradistinction to an actual, and precise statement of the very expressions used.

* See Hugh Pyne's case, Cro. Car. 117, which was submitted to all the judges for their opinion, when many indictments for uttering traiterous and seditious words were cited, in many of which nothing more than the Latin translation was set out.

since in many instances it would be impossible to render the expressions used into Latin ones perfectly synonymous.

And it appears * to have been the opinion of Holt, C. J. in Dr. Drake's case, that the libel might have been set forth in the information in Latin, in which case a variance, which did not change the sense, would not vitiate it.

No argument can, however, be drawn from this source, in support of a substantial, in opposition to a precise statement, since the doctrine has been virtually overruled; for if it were sufficient to set out a Latin translation whilst the proceedings were drawn in Latin, it would, on the same principle, after the passing of the statutes † which direct the English to be substituted for the Latin language in all legal proceedings, have been sufficient to set out a libel published in French or Italian merely by an English translation. But in the case of Zenobio v. Axtell ‡, judgment was arrested, because a libel published in French had not been set out in the original language, but merely described by way of translation. And Lord Kenyon, C. J. upon that occasion observed, that from the uniform current of proceedings, it appeared that the original words should be set forth with an English translation, shewing their application to the plaintiff.

* Holt, R. 351.
† 2 G. 2. c. 2. and 6 G. 2. c. 14.
‡ 6 T. R. 162.

In the case of the Queen v. Dr. Drake*, Holt, C. J. is reported to have said, "A libel may be described either by the *sense* or by the *words;* but by the Chief Justice's application of this doctrine, it appears that he did not mean that a mere description of the words by their *effect* would be sufficient; for he observes, "A libel may be described either by the sense or by the words of it, and therefore an information, charging that the defendant made a writing containing such words, is good, and in that case a nice exactness is not required, because it is only a description of the sense and substance of the libel; and if the Jury find some omissions, it will be sufficient if *some words be proved.*" The latter expression, "if some words be proved," clearly evinces that the very words, and not merely their effect, were to be set out; and that his Lordship meant to say, not that it is unnecessary to state the words themselves, but that they may be stated two ways, either by their *tenor*, in which case the pleader undertakes to set out the words with the greatest precision, and the libel given in evidence must agree exactly with the one set out in the information, or by stating that the defendant made a writing containing *inter alia* the words set out, in which case it would be necessary to set out those only which are material, and a variance would not be fatal, unless the sense were altered.

* 3 Salk. 224. Holt, R. 347. 349. 350. 425. 11 Mod. 95.

In the case of Newton v. Stubbs *, the action was brought for words spoken, which were set out in the declaration *ad tenorem et effectum sequentem;*" and after verdict for the plaintiff, judgment was arrested, because it was not expressly alleged that the defendant spoke the very words.

In the case of the King v. Bear †, the indictment was for composing, writing, making, and collecting several libels in *uno quorum continetur inter alia juxta tenorem et ad effectum sequentem*, and the words were then set out.

And it was agreed that *ad effectum* would of itself have been bad, since the court must judge of the *words themselves*, and not of the construction the prosecutor puts upon them, but that the words *juxta tenorem sequentem* import the very words themselves †. And it was held, that the words "*ad effectum*" were loose and useless words; but that the words *juxta tenorem* being of a more certain and strict signification, the force of the latter was not hurt by the former, according to the maxim "*utile per inutile non vitiatur.*"

In the same case †, that of Ford v. Bennett was referred to, where in a special action upon the case against Bennett and others, the plaintiff declared that the defendants, at Saltashe, procured a false and scandalous libel against the plaintiff to be written under the form of a petition, and the libel was set

* 3 Mod. 71. † 2 Salk. 417. ‡ 1 Lord Ray. 415.

forth after the words *continetur ad tenorem et ad effectum sequentem*. Two were found guilty, upon which judgment was entered for the plaintiff, and afterwards upon error brought in the Exchequer, the judgment was affirmed, the exception taken to the words *ad effectum* having been overruled without consideration. And Holt, C. J. said, that he then thought the judgment to be given with too great precipitation; but he afterwards, upon great consideration, had esteemed it to be very good law. And the King v. Fuller*, and the King v. Young†, were cited as authorities in point; and the whole court were of opinion, that notwithstanding the exception, the indictment was good; but that if it had been only *ad effectum sequentem*, it had been ill, because it had not imported that the words were *the specific words* which were in the libel.

In the above case of the Queen v. Drake‡, a distinction was taken between an action for libel and one for words, and that in the latter case it would be sufficient to find the substance; but in case of words spoken, as well as written, it has been held necessary to set out the words themselves, and that it is insufficient to aver that the defendant spoke these words *vel his similia* §.

* Mich. 4 W. & M.

† Mich. 4 W. & M.

‡ Holt, R. 348. 350.

§ Cro. J. 159. 1 Vin. Ab. 533. pl. 1. Br. Ac. sur le cas. pl. 112. 4 Ed. 6. 4 T. R. 217.

And next, *the statement of the words written or spoken must correspond with the publication, to be proved.*

It has been said *, that the strictness formerly observed as to proving the words precisely as laid, has been abandoned, and that it is sufficient to prove the substance of them; but, at the present day, it seems requisite to prove some of the words, though not all, *precisely as they are laid*, both in case of oral and written slander.

If the slander † be contained in words of interrogation, it must be so laid, and must not be averred to have been spoken affirmatively.

In the case of the Lady Ratcliffe v. Shubly ‡, the words laid in the declaration were, "She is as very a thiefe as any that robbeth by the highway side." The jury found that the defendant spoke these words, "She is *a worse* thiefe than any that robbeth by the highway side." And Wray, C. J. was of opinion, that "as very a thief," and "a worse thief," are all one; but Gawdy and Fenner, Justices, ruled that the words did not agree with the declaration.

So, an indictment for speaking these words of a magistrate §, "He is a broken down justice," is

* B. N. P. 5. cites 2 Roll. Ab. 18. a. Avarillo v. Rogers, T. T. 1773.

† 2 East, 434. 8 T. R. 150. 4 T. R. 217.

‡ Cro. Eliz. 224. But see Dyer, 75.

§ R. v. Berry, 4 T. R. 217. Blisset v. Johnson, Cro. Eliz. 503, contra.

not satisfied by evidence of the words, "You are a broken down justice." Lord Kenyon, indeed, in this case, held at nisi prius, that it was sufficient to prove the *substance of the words stated*, and the defendant was found guilty; but the point was reserved, in order that a verdict of acquittal might be entered, in case the court should be of a different opinion. On motion to that effect, Buller, J. said, that there was a case in Strange, in support of his lordship's opinion, but that it had since been overruled in Lord Mansfield's time, and that he himself had known a variety of nonsuits on the same objection; and judgment was given for the defendant.

So, where A.* says of B. and C. "You have committed such an offence," though B. and C. may have separate actions, each must state the words to have been spoken of both.

So, where the words are spoken† ironically, they must be stated as spoken, with an averment that they were spoken ironically.

Where the declaration stated these words of the plaintiff, "He stole a sheep of his," (innuendo of the defendant.) It was moved in arrest of judgment, that *his* must refer to the last antecedent, and so that the words were repugnant, for a man cannot steal his own sheep‡; but the objection was overruled.

Upon the authority, however, of more recent

* Cro. Car. 512. † 11 Mod. 86. ‡ 8 Mod. 30.

cases, it seems the variance between the words *his*, as used in the declaration, and *mine*, as proved in evidence, would be a ground of nonsuit.

Where the words laid in the declaration *, as spoken of a surveyor, were, "Harrison is a scoundrel, if I would have found him an oven for nothing, and given him after the rate of £20 per cent. upon the amount of the charges for work and materials, he would have passed my account." The first witness called for the plaintiff proved these words: "Harrison is a scoundrel, and if I had allowed £20 per cent. he would have passed my account." The second witness proved the words, "Harrison is a scoundrel, and if I had deducted £20 per cent. he would have passed my account."

Lord Ellenborough, C. J. said, that words to be actionable, should be unequivocally so, and be *proved as laid;* but that, as the words were proved, they did not support the declaration. The words of the declaration were, "If he would give me £20 per cent." that might mean something to himself, by which he would be himself benefited to the prejudice of his employer, but the words proved were, "If he would allow," or "if he would deduct £20 per cent." These words might import an allowance or deduction from the plaintiff's bill for the benefit of his employer, and were of a different meaning and import."

* 4 Esp. R. 218.

Where the words are spoken, or libel published, in a foreign language, they must be set out in the original language, otherwise the declaration will be bad in arrest of judgment*. But it seems that an English translation of them ought likewise to be set forth, shewing their application to the plaintiff.

But in an anonymous case in Hobart†, the plaintiff declared against the defendant for calling him *Idoner* in the Welsh tongue, and had judgment, though he did not aver that the word amounted to a charge of perjury; and the case was cited, in which the plaintiff had judgment for the words, "Thou art a healer of felons," without any averment how the words were taken; because the court were informed, and took notice that, in some counties the term *healer* was understood to mean a smotherer or coverer of felons.

But at all events, the more correct mode is to aver the meaning of the words in English, since, when the original publication is made either in a foreign language or in a dialect of this kingdom, their meaning ought not to rest upon mere evidence, but to appear on the record, that a correct judgment may be given upon that meaning after it has been ascertained by a jury.

It may next be considered what variances between the words stated and those proved, are fatal to the action.

* Zenobio v. Axtell, 6 T. R. 162. † 126.

The variance must consist either in the *addition* or *omission* of one or more words, or in the *substitution* of one word for another. First, in the addition.

It is not necessary, in case of verbal slander, to prove all the words, provided such of them be proved as are material.

The plaintiff declared that the defendant said of him, "He is a maintainer of thieves, and a strong thief." The jury found the whole to have been said except the word *strong*, and it was adjudged for the plaintiff*.

And even where special damage is the gist of the action, it is sufficient to shew that the loss was sustained in consequence of any of the words laid in the declaration †.

But if all the words, as laid, constitute but one charge, the whole must be proved.

The declaration stated that the defendant said of the plaintiff, "He is selling his coals at one shilling a bushel, to pocket the money, and become a bankrupt to cheat his creditors." Upon trial, the words "and become a bankrupt," were not proved, and the plaintiff was nonsuited ‡.

And the reason applies with equal force in the case of libel, where the addition of a word not proved would be fatal, if it at all affected the sense, whether the words were set out under an *inter alia* or *ad tenorem*.

* Burgis's case, Dyer, 75.

† Holt, R. 139.

‡ Flower v. Pedley, 2 Esp. R. 491.

With respect to variances from omission, it seems in all cases sufficient to set *out the words which are material*, and it is not even necessary to state words which may qualify the objectionable ones; and in the case of libel, it may be averred in *uno quorum continetur inter alia, &c.**; for, if something else were added, which did in fact qualify the objectionable words, it may be given in evidence on not guilty †.

In Sir J. Sydenham's case ‡, an action was brought for these words: "If Sir John Sydenham might have his will, he would kill all the true subjects of England, and the king too; and he is a maintainer of papistry and rebellious persons." The defendant pleaded, that he spake other words, *absque hoc*, that he spake these. The jury find that he spoke these words: "*I think, in my conscience*, if Sir John Sydenham," &c. and found all the other words verbatim, and conclude *si super totam materiam*, he spake the words *forma qua* the plaintiff declared, they find for the plaintiff to his damage of 160 marks, if otherwise, for the defendant. And three of the judges, Montague, C. J. Croke, and Dodderidge, J. held, that the plaintiff was entitled to judgment, since the other words found were not words of extenuation or alteration of the sense of the former words, but rather enforced them, and that there was no cause to stay the plaintiff's judgment.

* R. v. Beare, 4 Rep. † 8 Mod. 329. ‡ Cro. J. 407.

For though the plaintiff declared of more words than the defendant spake, yet he declaring truly that the defendant spake those words, upon the evidence it appears that he spake these words which are actionable, and the words added, diminish not, nor are an alteration of the sense of the words whereof he declares; wherefore, although the issue be specially found, yet the plaintiff shall have judgment.

The fourth judge (Houghton) was of opinion, that the omission of part of the words proved, though the sense was unaltered, was a fatal variance.

A writ of error * was afterwards brought upon this judgment, and one ground of error assigned was, the variance between the words declared upon and proved; and of this opinion were Hobart, C. J. of the Common Bench, Winch, and Denham; but Tanfield, Chief Baron, Warburton, Bromley, and Hulton, were of a contrary opinion, whereupon the judgment was affirmed.

And the rule is the same with respect to written slander; for though, in the different reports of the case of the Queen v. Drake, a distinction is made between cases where the libel is set out *juxta tenorem*, or in *hæc verba*, and where it is set out under an *inter alia*, there seems to be little distinction between them, since, under the latter averment, some of the words must be proved as laid, and any varia-

* Mich. 16 Jac.

tion *from the sense* would be fatal. It is to be observed too, that the word tenor does not necessarily imply an undertaking to set out a copy of the whole publication without addition or diminution, since, in the King v. Beare, where the point was much considered, the prefatory words were, *in uno quorum continetur inter alia juxta tenorem, &c.* where both *inter alia* and *juxta tenorem* were used, and no objection was taken on the ground of any inconsistency in the allegation *.

The reasoning of the three judges in Sir J. Sydenham's case, applies equally to the case where the libellous part only of an offensive publication is set out; for though, on evidence, it appear that more was published than appears on the face of the indictment or declaration, it is nevertheless true that the defendant published the part complained of as alleged, although he, at the same time, published other matter.

If the additional words proved be altogether unimportant, their insertion would have been nugatory; if their effect be to alter the sense of the part already set out, the defendant will have the advantage of it by giving it in evidence under the general issue.

One count of a declaration stated the words of a libel as follows: "My sarcastic friend, by leaving

* See Haw. P. C. c. 46. s. 140. Leach's C. C. L. 158. 172.; from which it appears, that in criminal cases where the descriptive term "tenor" is used, a variance in the spelling of a word will not be fatal, unless the sense be altered.

out the repetition or chorus of Mons. T.'s poem, greatly injures the *tout ensemble*, or general and combined effect." The words proved in evidence were, "My sarcastic friend MΩPOΣ, by leaving out," &c. And it was held by Lord Ellenborough, C. J. upon trial of the cause, that there was a material variance between the libel declared upon in that count and the libel proved, and that the plaintiff was not entitled to recover on that count *.

But though it is not necessary to state the whole of a libellous publication, yet, if the most offensive parts be selected, the passages which are not continuous in the original must be set out so in pleading, since any alteration of the sense arising from such a new arrangement would be a ground of nonsuit †.

The correct mode of setting out two selected passages in the same count, is by saying, "In a certain part of which said libel there was and is contained, &c. and in a certain other part of which said libel there was and is contained," &c.

With respect to the alteration of a single letter, the rule seems to be, that if the sense be thereby altered, the variance will be fatal, but not otherwise‡.

* Tabart v. Tipper, Camp. N. P. 350.
† Camp. N. P. C. 353.
‡ 3 Salk. 224.

Provided the sense be not altered, the variance is not material even in an indictment for perjury. In the case of the King v. Beach *, a variance was relied upon in favour of the prisoner between the indictment for perjury and the affidavit on which the prosecution was founded. In the affidavit, the defendant swore that he *understood* and believed, &c. The assignment of perjury in the indictment was, that he had falsely sworn that he *undertood* and believed, &c. omitting the letter *s*.

Lord Mansfield—" This is an application for a new trial in an indictment for perjury, upon the ground of a material variance between the affidavit and the indictment, the letter *s* being left out in the word understood. We have looked into all the cases on the subject, some of which go to a great length of nicety indeed, particularly the case in Hutton, where the word *indicari* was written for *indictari*, but that case is shaken by the doctrine laid down in Hawkins †.

" The true distinction seems to be taken in the Queen v. Drake ‡, which is this; that where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material §."

* Leach, C. C. L. 158.

† 2 Hawk. Pl. C. c. 46. s. 190.

‡ Salk. 660.

§ See Hart's case, Leach, C. C. L. 172. Douglas, 194.

If the omission even of a letter render a word of a different signification from that contained in the libel, the variance, it seems, will be fatal *.

As, when the word *not* was stated instead of *nor;* for it was said, if in such a case a letter could be amended, why not a word, why not a sentence, and where would the *non ultra* be found; that this was not so small a variance of a letter, as in false spelling or abbreviations, as if gaine instead of gain, where the word and sense would be the same; but that, in the principal case, the words were different and of different significations, different parts of speech, the one an adverb, the other a conjunction, the one positive, the other relative. It was observed too, that though the objection was in appearance trivial, the consequences were weighty; and that if the variance were not considered as fatal, the judges would have too great power in cases of treason, where the decision would be quoted as a precedent.

Next it is to be considered whether the words are, upon the face of them, illegal, or require the aid of some extrinsic circumstances to explain their quality. It may be laid down as a general rule, that where *the slanderous charge or imputation can be collected from the words themselves, it is unnecessary to make any averment as to circumstances, to*

* 3 Salk. 224.

whose supposed existence the words refer. For the slander, which is the ground of proceeding, appearing on the very face of the publication, it is a matter of indifference as to the cause of action, whether the circumstances referred to really existed, or were invented by the defendant. In the latter case, indeed, the moral guilt of the slanderer may be enhanced in proportion to his wanton disregard of truth; but it would be unreasonable on that account to impose upon the plaintiff in any case, the difficulty of proving either the truth or falsity of the facts presumed by the defendant.

Thus, when a person says of another *, "That is the man who killed my husband," no averment of the husband's death is necessary, for the defendant's words have ascertained the death.

The defendant said to the plaintiff †, "Thou hast given J. S. £9 for forswearing himself in chancery; and hast hired him to forge a bond." After verdict for the plaintiff, it was moved in arrest of judgment, that the declaration contained no allegation that any suit was in chancery, or that J. S. forswore himself in his answer, or as a witness; or that the plaintiff suborned J. S. to forswear himself, or shew any particular wherein he forswore himself. But it was held that these averments were immaterial; for if J. S. never was sworn, it

* Button v. Heywood and his Wife, 8 Mod. 24. Vent. 117.
† Cro. Car. 337.

was scandalous in the defendant to say that the plaintiff procured J. S. to forswear himself in a court of record, although it was merely false, because he never was sworn. And that as to the bond, though it was not said that J. S. had forged a bond, the charge against the plaintiff was nevertheless scandalous.

In an action for these words *, "Thou hast killed thy master's cook." On motion in arrest of judgment, it was held unnecessary to make any averment, shewing who the plaintiff's master was, or that he was the master of the person slain, because the words in themselves imputed slander.

In Wilner v. Hold, the words were, "Thou art a rogue and a rascal, and hast killed thy wife." On motion in arrest of judgment, amongst other causes, it was alleged that an action lay not for the words, because it was not shewn that the wife was dead, or how she was killed; but the objections were overruled †, and the plaintiff had judgment.

There are, notwithstanding, many cases in the books where averments of the kind have been deemed indispensable; but since these are contradicted by the more modern decisions ‡, and are rather remarkable for their subtlety than for either convenience or consistency, it would be a waste

* Cooper v. Smith, Cro. J. 423.

† See 1 Vin. Ab. 518. pl. 1, 2.

‡ Peake v. Oldham, Cowp. 275.

of time to take further notice of them than by citing a few specimens.

After verdict for the words, "Thou art as arrant a thief as any is in England," * it was held, in arrest of judgment, that the words were not actionable, for want of an averment that there was any thief in England.

After verdict for the words, "Thou art a murtherer, for thou art the fellow that did kill Mr. Sydnam's man," judgment was reversed, for want of an averment that any of Mr. Sydnam's men had been slain †.

And where the words of the defendant are general, no explanation is necessary to render them more particular.

The defendant ‡ charged the plaintiff with having forsworn himself in his answer to a bill in chancery. After verdict for the plaintiff, it was moved in arrest of judgment, that the particulars of the perjury imputed were not pointed out in the declaration, and that many indictments for perjury had been quashed, for not shewing the perjury to have been in a material point. But the court held, that though indictments ought to show

* Foster v. Browning, Cro. J. 687.

† Burrons v. Ball, Cro. J. 331.—See a conjecture upon the original reason of this scrupulous nicety, p. 81.

‡ Sir R. Snowde v. ——, Cro. Car. 321.

the cause of perjury, yet, that in an action for words which is grounded upon the speech of another, the charge cannot be enlarged farther than the other spoke.

Next, with respect to the connection of the words with the plaintiff, where they are intrinsically actionable, and with extrinsic circumstances, when such are necessary to make the actionable quality apparent on the face of the record.

Formerly it was the practice to aver, that the defendant spoke the words in a certain discourse which he had with others, or with the plaintiff himself in the presence of others, concerning the plaintiff. This was technically called laying a colloquium, and till the case of Smith v. Ward *, it seems to have been doubted whether a declaration without a colloquium would be good. In that case, it was alleged that the defendant said of the plaintiff, "He (innuendo the plaintiff) is a thief;" and the court, on being informed that it was the common course to declare that he said *de præfato querente hæc verba*, held it to be sufficient without a colloquium.

But though the custom was to lay a colloquium, it was always held necessary to aver that the words were spoken concerning the plaintiff.

Where actionable words are spoken to a plaintiff, it is sufficient to lay a colloquium with him

* Cro. Jac. 673. 3 Salk. 328. Sir T. Ray. 85.

without an express averment that the words were spoken *de querente*; since it cannot but be intended that the words were spoken to him with whom the conversation is alleged to have been had *.

But where actionable words are spoken in the third person, as, "He is a thief;" though a colloquium of the plaintiff be laid, it is necessary to aver that the words were spoken concerning the plaintiff †.

And it is not sufficient in such case to connect the words with the plaintiff by means of an innuendo ‡.

But where a colloquium is laid, and there is an innuendo of the plaintiff, it seems the want of a direct averment must be pointed out by special demurrer, and that it will be intended after verdict, or upon general demurrer, that the words were spoken of the plaintiff, but that where no communication is laid concerning the plaintiff, the omission of such an averment § is fatal to the declaration.

Where the person slandered is pointed out by

* Roll. Ab. 85. pl. 8. 1 Will. Saun. 242. (a) n. 3.

† Roll. Ab. 85. l. 30. 1 Sid. 62. 1 Com. Dig. tit. Defam. G. 7.

‡ Cro. J. 126.

§ 9 Roll. R. 244. Skutt v. Hawkins, 1 Will. Saun. 242. a. n. 3.

the prefatory words thy son, thy brother, &c. or my son, my brother, which description may possibly apply to several, from the current of decisions it seems, that the plaintiff must aver that he stood in the described relation, and that he was the son or the brother of the person addressed in the former case, or of the speaker in the latter, and that a general allegation that the words were spoken of and concerning the plaintiff is insufficient*.

So, where the words were, "Go, tell my landlord (innuendo the plaintiff) he is a thief †." Judgment was given against the plaintiff, for not having averred that he was the landlord of the defendant, although he had averred that the words were spoken of himself. And it is not sufficient to bring the plaintiff within the description by means of an innuendo ‡.

And even where the description could by possibility apply to one person only, it has been held that an averment is necessary, to shew that it was applied to him.

The plaintiff declared that the defendant having a discourse concerning the plaintiff with divers other persons, said these words of the plaintiff, "Your father (meaning the plaintiff) hath struck and killed Nicholas Russell." And after verdict

* 1 Roll. 84. l. 15. 30. 50. 85. l. 45. Cro. Car. 448. Jon. 376. Cro. Eliz. 416, even after verdict.

† Cro. Car. 420.

‡ Delamore v. Heskins, Hill. 11 Car. K. B. 1 Vin. Ab. 528.

for the plaintiff, judgment was arrested, because it was not averred that the plaintiff was father to him to whom the words were spoken *.

In Shalmer v. Foster †, the declaration stated, that "The wife of the defendant spake of the foresaid plaintiff to Ann Rochester, the plaintiff's mother, these words, "Where is that lying thief, thy sonne, &c." And it was moved in arrest of judgment, that the words were uncertain, no precedent communication being alleged to be of the plaintiff, nor that he was the only son of the said Ann Rochester, to whom the words were spoken, and that it might be that she had divers sons, and every of them might have an action as well as the plaintiff, and that there was an ambiguity who was meant by the words. And Whitelock and Croke were of that opinion; and the latter cited the cases of Harvey and Chamberlain ‡, and of Burnet and Codman §, where for such words it was adjudged for the defendant. But Hyde, C. J. and Jones, J. doubted thereof, because it was alleged that she spoke of the plaintiff, and was found guilty. But it was answered, that so were the words in every declaration, and that so it was in the precedents cited ||.

* Hil. 1652. Rot. 1037. 1 Vin. Ab. 530. Golds. 187. Cro. Eliz. 416. 439. Cro. Car. 92. 178. Mo. 365.

† Cro. Car. 177. But see Cro. J. 107.

‡ E. T. 20 J. 1. § T. T. 5 J. 1.

|| The court adjourned.

At this day, after so many of the technical niceties, with which actions of this description were formerly encumbered, have been defeated, it may well be doubted whether much attention would be paid to these cases. The real end and object of such averments is, to shew with certainty that the plaintiff is the person aimed at by the defendant; and though, upon the face of the words themselves, their application may be ambiguous, as where the defendant says, thy son, or thy brother, yet there appears no want of certainty upon the record, when it is alleged that the words were spoken *of the plaintiff*; and whether they were so applied or not, is a matter of evidence, to be proved by shewing that he did stand in the relation specified, and without due proof of which the jury could not possibly find the truth of the averment that the words were spoken concerning him.

Considering, however, the great number of express decisions upon this subject, it would not be prudent to omit a special averment.

Where the description may apply to several persons, as brothers or sons, it is unnecessary for the plaintiff to aver, that he was the only brother or only son, so as to make it appear that the description applied to himself exclusively. This objection, however, appears to have been frequently taken; and in Wiseman v. Wiseman*, where the defend-

* Cro. J. 107.

ant spoke the words *de præfato querente existente fratre suo naturali*, on motion in arrest of judgment, it was held by Yelverton, J. that the words were too uncertain; that words, to be actionable, ought to import in themselves precise slander without ambiguity, so that every one who heard them might intend of whom they were spoken; for otherwise, if it could be helped by the averment of the plaintiff, every one who was his brother might make the same averment, and have an action which would not be reasonable. But it was afterwards adjudged, by all the judges, for the plaintiff.

A distinction was taken in the last case by Tenfield, J. between words importing in themselves apparent uncertainty, and those which might be ascertained by intendment. That, in the first case, no averment would aid the uncertainty, but that in the latter, it might be aided by an averment and verdict; and therefore, if the words had been "one of my brothers is perjured," there would be in them an apparent uncertainty; and that, although one of the brothers should bring the action, and aver that they were spoken of him, yet that because it appeared to the court that there were divers brethren, and that it did not appear to any of whom he spake, no action would lie, although the defendant should be found guilty by verdict.

But it has since been held *, that for disjunc-

* Harrison v. Thornborough, 10 Mod. 196.

tive words, as that A. or B. committed such a felony, both A. and B. are entitled to recover, and it would probably now be decided upon the same principle, that in the case put by the learned Judge, each brother would be allowed to maintain his action.

When the plaintiff's name is mentioned, though a further description be given*, the general averment is sufficient, without a special allegation that such further description applied to the plaintiff. As, where the speaking is alleged to be of the plaintiff, and the words are stated, "T. (innuendo the plaintiff) is thy brother, &c." it is sufficient without any other averment.

In Nelson v. Smith †, the words were, "Captain Nelson is a rogue and a thief, and hath stolen away my goods;" and it was held, that the declaration was good without any averment that he was a captain, or known by that name, inasmuch as there was a communication of the plaintiff, and it was averred that the words were spoken of him.

The general rule is, that where the party can shew that he was intended by the defendant, he may maintain an action, whatever be the mode of description.

Thus, for the words, "The parson of Dale is a thief;" it was held that he who was parson of

* Cro. Eliz. 429.

† 22 C. 1. B. R. See also Osborne v. Brookes, 1 Vin. Ab. 529. 1 Roll. Ab. 95.

Dale at the time the words were spoken might maintain an action*.

The defendant said†, "That murderous knave Stroughton lay in wait to murder me;" and the action brought by Thomas Stroughton was held maintainable.

When the actionable quality is derived from explanatory circumstances extrinsic of the words, the connection with those circumstances must appear.

The technical mode of effecting this is, by first stating in the introductory part of the declaration those extrinsic facts by reference to which the words complained of become actionable; secondly, averring that the words related to those facts by laying a colloquium, as it is usually termed; and thirdly, connecting, by averments called innuendos, such parts of the publication as want explanation, with the introductory facts previously exhibited upon the record.

By this process, the extrinsic facts incorporated as it were, in the defendant's publication, become an integral part of the plaintiff's case, and the whole forms one entire slanderous charge upon the face of the record.

The nature and certainty of these two kinds of averments are next to be considered.

First, of the colloquium ‡ or general averment,

* 3 Buls. 326. † Shepp. Ac. 59.

‡ To avoid circumlocution, the term colloquium is used, not in its strict, but in its technical sense, to signify this general averment.

connecting the whole of the publication with the introductory facts.

Where the words are actionable, as affecting the plaintiff in a special character, an averment that they were applied to him in that particular character is necessary *, unless that application necessarily appear from the words themselves; in which case, the general allegation that they were spoken concerning the plaintiff, is sufficient.

The defendant said of a tradesman †, "He is a sorry pitiful fellow, and a rogue, he compounded his debts at five shillings in the pound;" and the declaration was held good, without an express colloquium of the trade.

So, where the words published of a tradesman ‡ were, "Have a care of him, do not deal with him, he is a cheat, and will cheat you; he has cheated all the farmers at Epping, and dares not shew his face there, and now he is come to cheat at Hatfield." And the court said, the words themselves supply a colloquium, they appear to be spoken of his trade.

So, where the words spoken of a justice of the peace were, "I have been often with Sir John Isham for justice, but could never get any thing at his

* Savage v. Robery, 2 Salk. 694. Savile v. Jardine, 2 H. Bl. 531. Burnet v. Wells, 12 Mod. 426. Str. 1169. 3 Salk. 326. Ld. Ray. 610. 8 Mod. 271. Cro. Car. 417.

† Lord Raymond, 1480. Stanton v. Smith.

‡ 2 Lev. 62.

hands but injustice;" it was held that the words were actionable without colloquium, and that the court would intend that the words were spoken of him as a justice, and not as a private man *.

So, where the defendant said of an attorney, "He is a common barretor;" it was held unnecessary to aver that the words were spoken of the plaintiff in his profession, for the court would intend it, and that words were to be construed *secundum conditionem personarum* of whom they were spoken.

So, where † the words spoken to a merchant were, "He is not worth a groat, he is £100 worse than nought."

So, where the defendant said to a physician‡, "Thou art a drunken fool and an ass, thou wert never a scholar, and art not worthy to speak to a scholar." The words were held actionable, though no communication was laid of the plaintiff's profession.

In general, where facts extrinsic of the words and of the plaintiff's character are necessary to support the action, the plaintiff must aver that the publication was made in reference to those facts.

The declaration § stated that the plaintiff, a con-

* Cro. Car. 15. 192. 459. Cro. J. 557. 1 Lev. 280.

† Cro. Car. 265.

‡ Cro. Car. 270.

§ Drake v. Corderoy, in error, Cro. Car. 288.

stable of D., was sworn before the justices at their quarter sessions concerning an affray made by the defendant upon one F. and that the defendant then and there in the said court and in the presence of the justices, said, he (innuendo the plaintiff) is forsworn, and it was held, the declaration was bad without a colloquium of the oath so taken, because it was necessary for the declaration to shew that the words intended a false oath in a court of record.

The declaration* stated, that the plaintiff had put in an answer upon oath to a certain bill filed against him in the court of exchequer by the defendant, and that the latter, in a certain discourse which he then and there had with one R. W., the plaintiff's servant, said, "I have no doubt you will forswear yourself, as well as your master (the plaintiff) has done, before you," meaning and insinuating thereby that the plaintiff had perjured himself in what he had sworn in his aforesaid answer to the said bill so filed against him as aforesaid.

In another count, the words spoken by the defendant to the said R. W. the plaintiff's servant were laid thus: "Your master (meaning the plaintiff) has both cheated people out of their wages, and forsworn himself;" thereby meaning that the said plaintiff had perjured himself in the aforesaid answer, so put in by him to the bill so filed against

* Hawkes v. Hawkey, 8 East, 427.

him as aforesaid. It was held, after verdict, that both these counts were bad, on the ground that there was no colloquium laid of the plaintiff's answer to the bill in chancery, and that it did not appear that the words were spoken in relation to that answer, and that without such an averment the innuendo was unwarranted.

The colloquium ought to extend to the whole of the prefatory matter necessary to render the words actionable. The plaintiff * declared, that some evil persons unknown, had feloniously shorn the sheep of C., and that there being a communication between the defendant and another, *concerning the shearing of those sheep*, the defendant said, "I do know who did shear the sheep;" and being asked who it was, he replied, that it was the plaintiff, *innuendo felonice*, and Houghton and Doderidge, Justices, against the opinion of Croke, J. held, that the words were not actionable, since the colloquium was of the shearing of the sheep only, and not of the felony.

Secondly, with respect to the nature and office of the innuendo.

An innuendo † may be defined to be *an averment which explains the defendant's meaning by reference to antecedent matter.* The principal and

* 3 Buls. 83. Helly v. Hender.

† 2 Salk. 513. 1 Ld. Ray. 256. 12 Mod. 139. 1 Will. Saun. 243.

important rule of law relating to this species of averment is, that its office is merely to explain, by pointing out the defendant's allusion, and that it can in no case be allowed to introduce new matter. And the reason for this is a most substantial one; for were it otherwise, questions of law and fact would frequently be confounded together. For instance, suppose the defendant had said, "You are forsworn," which words would not be actionable, unless spoken * with reference to a judicial oath, if the plaintiff averred by way of innuendo, and without reference to antecedent matter, meaning thereby "that he the said plaintiff was forsworn in a court of record," or meaning thereby "that he the said plaintiff was perjured;" the averment would involve a question of law, and the jury would have to decide upon evidence, whether the forswearing did in law amount to perjury, and the question would not be open to the court upon the record; and besides this, that clearness and precision would be wanting which is essential to a legal and technical statement of the case.

In the King v. Horne †, De Grey, C. J. observed, "In the case of a libel, which does not in itself contain the crime without some extrinsic aid, it is necessary that it should be put upon the

* Holt v. Scholefield, 6 T. R. 691.

† 2 Cowp. 683.

record by way of introduction, if it is new matter, or by way of innuendo if it is only matter of explanation. For an innuendo means no more than the words "*id est*," "*scilicet*," or "meaning," or "aforesaid," as explanatory of a subject matter sufficiently expressed before, as such a one, meaning the defendant, or such a subject, meaning the subject in question."

An innuendo, therefore, cannot extend the sense of the words beyond their own meaning, unless something is put upon the record for it to explain.

As, in an action upon the case against a man, for saying of another *, "He has burnt my barn;" the plaintiff cannot there, by way of innuendo, say, meaning, "his barn full of corn," because that is not an explanation of what was said before, but an addition to it.

But if, in the introduction, it had been averred that the defendant had a barn full of corn, and that in a discourse about that barn, the defendant had spoken the words charged in the declaration of the plaintiff, an innuendo of its being the barn full of corn would have been good; for, by coupling the innuendo in the libel with the introductory averment, "his barn full of corn," it would have made the sense complete.

If the innuendo materially enlarge the sense of

* Barham's case, 4 Co.

the words, it will vitiate the declaration even after verdict.

The plaintiff*, in the first count, laid these words as spoken by the defendant, "John Holt (meaning the plaintiff) has forsworn himself, (meaning that the plaintiff had committed wilful and corrupt perjury.) After a general verdict for the plaintiff with entire damages, judgment was arrested, on the ground that the words in the first count were not in themselves actionable, and that the count contained no colloquium or averment of the words having been spoken of a forswearing in a court of justice, and that the innuendo could not extend their meaning.

In the case of the King v. Alderton †, the alleged libel was contained in an advertisement, reciting certain orders made for collecting money, on account of the distemper among the horned cattle, advertised by the clerk of the peace for the county of Suffolk; and it charged, that by these orders the money collected had been improperly applied. The information stated this to be a libel upon the Justices of Suffolk. In the body of the libel it was not said, "by the order of the justices," nor did the information in the introductory part say that it was a libel of and concerning the Justices of Suffolk. But when the informa-

* Holt v. Scholefield, 6 T. R. 691.

† Say. R. 280.

tion came to state any of the orders in the advertisement, it added this innuendo, "meaning an order of the Justices of peace for the county of Suffolk;" but these innuendos could not supply the want of an averment in the introductory part, of its having been written "of and concerning the Justices," because they were not explanatory of, but in addition to the former matter. And the court were of opinion that the information having omitted the words "of and concerning the justices" in the introductory part, such omission was fatal, and judgment was accordingly arrested.

In the case of Hawkes v. Hawkey *, before referred to, it was decided that where the introductory matter has been properly stated, it is necessary to connect the whole publication with it, by means of a general averment that it related to such previous matter, and that it was not sufficient to do it by means of an innuendo only.

Upon motion in arrest of judgment, Lord Ellenborough, C. J. was of opinion, that it might be collected from what Lord C. J. De Grey said in Barham's case †, that he conceived an introductory averment that the defendant had a barn full of corn, *and also* an averment that the defendant spoke the words in a discourse concerning that barn, necessary to warrant the innuendo "my barn full of corn." His Lordship added, "If a

* 8 East, 427. † 4 Co.

broad rule has been laid down as to the mode of declaring, in this species of action, whether properly laid down or not, in the first instance, it is better to abide by it, than to attempt making nice distinctions. The only peculiarity in this case which is relied upon, as distinguishing it from the current of authorities, is, the preliminary matter averred respecting the fact of the plaintiff having put in his answer to the bill filed in the exchequer; and the question is, whether the innuendo alone will refer the words spoken to such introductory matter so as to make it necessary for the plaintiff to prove any thing which he must have proved had a colloquium been laid; the case of Savage v. Robery seems to shew that it will not."

And the court*, after considering the case of the King v. Horne, gave judgment for the defendant.

In many instances, however, an innuendo will not vitiate the proceedings, though new matter be introduced.

As, where the matter is superfluous, and the cause of action complete without it.

The plaintiff alleged †, that the defendant addressed these words to him, "Thou art a rogue and a rascal, and hast killed thy wife;" innuendo one Elizabeth, late wife of the plaintiff. And the plaintiff had judgment, though the declaration contained no prefatory averment that the wife was dead.

* Cowp. 680. † Wilner v. Hold, Cro. Car. 489.

In Shalmer v. Forster and wife *, the declaration stated that the wife of the defendant spake of the foresaid plaintiff to Ann Rochester the plaintiff's mother these words: "Where is that lying thiefe, thy son (innuendo the plaintiff), he hath murdered my aunt (innuendo one Dorothy Stoke, the defendant's aunt), and I will prove it." After verdict for the plaintiff, though a motion was made in arrest of judgment upon another ground, no objection was taken to the innuendo of the plaintiff's aunt.

So, where the words were laid †, "Thou hast robbed the church (innuendo the church of St. Alphage), no objection was taken.

In Craft v. Boite ‡, the words, as laid in the declaration, were, "He (meaning the plaintiff) hath stolen two hundred pounds worth of plate out of Wadham College," (meaning a college called Wadham College, in the university of Oxford), though the declaration contained no previous averment of Wadham College, in the university of Oxford. It is suggested by the learned editor of Saunders's Reports, that the innuendo is on such account improper; the objection, however, appears to be rather of form than of substance; and probably such a declaration would be held good on general demurrer or after verdict, since the gist of

* Cro. Car. 496.

† 4 Cro. J. 153. 1 Vin. Ab. 512.

‡ 1 Will. Saun. 243.

the action is the charge of stealing from Wadham College, which is entirely unconnected with the situation of the college in the university of Oxford, so that the innuendo might be expunged without affecting the cause of action.

In Roberts v. Cambden *, the defendant said, "He (meaning the plaintiff) is under a charge of a prosecution for perjury. G. W. had the attorney-general's directions to prosecute;" and an innuendo that the attorney-general for the county palatine of Chester was meant, was rejected as surplusage.

An innuendo, when repugnant or insensible, may be rejected †.

The record of Nisi Prius stated, that the said William spoke of the said James these scandalous words following: "He (innuendo the said *William*) is a thief," where the innuendo should have been of James. After a verdict for the plaintiff, it was held that he was entitled to his judgment, since the innuendo was void, and an apparent misprision.

It does not, in any case, seem necessary that the innuendo should in terms state the legal inference which is to be drawn from the publication, as connected with the facts stated, its office seems more properly confined to mere reference of the defendant's meaning to previous matter; and, indeed, such an averment would be improper, since the actionable nature of the charge is a matter of

* 9 E. 83. † Cro. Car. 512.

law, which the court will collect from the facts, if they warrant such a conclusion; and if they do not, no innuendo of their legal effect will avail to render them actionable.

Thus, where, from the circumstances, it appears upon the whole that the defendant intended to impute a charge of wilful murder, it is unnecessary for the plaintiff to assert, by way of innuendo, that the defendant meant to impute the very crime of murder.

In Peake v. Oldham*, in error, the plaintiffs declared, that upon a colloquium concerning the death of one Daniel Dolly, the defendant said to the plaintiff, "You are a bad man, and I am thoroughly convinced that you are guilty (meaning guilty of the death of the said Dolly), and rather than that you should want a hangman, I will hang you."

After a general verdict with damages, the defendant brought a writ of error. Judgment, however, was affirmed, though the count alluded to contained no express allegation, by way of innuendo or otherwise, that the defendant intended to charge the plaintiff, with the crime of murder.

And though in the above case special damage was laid, it appears that the court held the words to be in themselves actionable; and Lord Mansfield observed, "These words plainly shew what

* 1 Cowp. 275.

species of death the defendant meant, and therefore manifestly in themselves import a charge of murder." On the contrary, if the plaintiff undertakes to explain the import of the words, by specifying the particular imputation intended by the defendant, such explanation will not vitiate the declaration, provided such an intention can be collected from the circumstances. Thus, in the case last alluded to, where a colloquium was laid concerning the *death* of Daniel Dolly, the plaintiff, in his fifth count, laid the words, "You are guilty," (innuendo of the murder of D. D.) And the count was held good after verdict, though the colloquium was of the death only, and the innuendo of the murder *.

An innuendo in one count may be supported by a colloquium in a previous one. In Tindall v. Moore †, the words laid in the first count were, "That rogue Joe Tindall (meaning the plaintiff) set the house on fire," (meaning the summer-house that was burnt in the occupation of one Mr. Cotton. In the fifth count the words were, "Joe Tindall (meaning the plaintiff) set the house on fire," (meaning the same house.) It was moved in arrest of judgment, that the words in the last count were not actionable, for that every count in a declaration is a substantive count, and that the

* See also Woolnoth v. Meadows, 5 East, 463, and Dame Morrison v. Cade, Cro. J. 162.

† 2 Wils. 114.

innuendo (meaning the same house) could not relate to the summer-house mentioned in the first set of words. But by the court, although the last set of words be not of themselves actionable, yet they shall have relation to the former set.

From these decisions it appears, that both the colloquium and innuendo are averments, whose office it is to connect the defendant's publication with the prefatory matter.

That the first is a general averment, connecting the whole of the publication with the previous statement; the latter a subordinate averment connecting particular parts of the publication with what has gone before, in order to elucidate the defendant's meaning more fully.

That the want of the colloquium cannot be supplied by an innuendo.

That the office of the innuendo is confined to a simple explanation of the defendant's meaning by reference to previous matter. That when it exceeds such limits in a *material point*, it will vitiate the declaration or indictment; if in an *immaterial* one, the fault will be cured by verdict, and would probably be overlooked on a general demurrer.

It would not be easy, or perhaps possible, to point out a more clear and convenient process for technically stating a case upon the record than this, which has with great wisdom been adopted by the law from very early times; it combines sim-

plicity with precision, separating the law from the fact, and exhibiting a statement of the cause of action upon the face of the record, plain and distinct in all its parts.

It is true, that in some instances justice may be defeated, from a want of attention to the maxims which regulate this technical kind of statement; but it is equally true that this cannot happen without a faulty inattention to a few very plain and rational rules, [redacted] that the failure might have been prevented by the exertion of a little prudence, aided by a very small stock of legal knowledge; and that, on the other hand, the general advantages in point of perspicuity and legal precision, which result from an adherence to these prescriptions, are too great to be placed in competition with any individual inconvenience arising from an ignorance or misconception of them.

CHAPTER XX.

Of Averments in General.

IN what cases it may be necessary to state prefatory circumstances, to be afterwards connected with the publication by means of a colloquium and innuendos, is of course a matter in which the pleader must exercise his discretion in the particular instance before him; the only general rule that can be laid down is, that such circumstances must be introduced upon the record, as will enable the court to decide upon the actionable quality of the publication, and the jury to find the facts which are connected with it.

Where, from the ambiguity of the terms in which a libel is expressed, it is doubtful who was meant, it is the proper office of the innuendo to render the allusion clear; as *, where but one or two letters of the name are expressed, or the plaintiff is libelled under a fictitious or borrowed name, or where the libel is couched under a fable or allegory, whose tendency and meaning it is necessary to explain with precision. Thus, in the case of

* Haw. P. C. c. 73. l. 5.

Sir Miles Fleetwood v. Curl.*, the plaintiff was receiver of the court of wards, and the words were laid in the declaration, with an innuendo, as follows: "Mr. *Deceiver* (meaning the plaintiff) hath deceived the king." It was assigned for error, that the innuendo could not be supported, but the court held that it was well applied.

So, in an information against Clerk †, for publishing a libel in "Mist's Journal," it was shewn by proper averments and innuendos, that in a pretended piece of Persian history the king and several other members of the royal family had been libelled, and that the king was represented under the name of Merewits, the Queen under that of Sultana, and that the character of the young Sophi was intended for the Pretender.

In Baxter's case‡, it was shewn that by the word Bishops, the Bishops of England§ were meant. In the King v. Franklin, that by "ministers," were meant the ministers of the King of England‖.

In an action for charging the plaintiff with having said that he could see no probability of the war's ending with France until the little gentleman on the other side of the water (innuendo the Prince of Wales) was restored to his rights. The court

* Cro. J. 557. 2 Rolls Rep. 148.

† Barnard, K. B. 304. Dig. L. L. 24.

‡ 3 Mod. 69.

§ 4 Bac. Ab. 454.

‖ 11 Mod. 99.

held, that this was certain enough even without an innuendo.

In Tucthin's case *, the introductory part of the information stated, that the libel was written concerning the royal navy of this kingdom, and the government of the said navy. One part of the libel was, "The mismanagements of the navy (innuendo the royal navy of this kingdom) have been a greater tax upon the merchants than the duties raised by parliament." And it was held, that "the navy" was well connected, by means of the innuendo, with the royal navy mentioned in the introductory part.

In the King v. Mathews †, the information in the introductory part charged the libel to have been written "Of and concerning the Pretender, and concerning his right to the crown of Great Britain."

The words of the libel were, "From the solemnity of the Chevalier's birth, and if hereditary right be any recommendation, he has that to plead in his favour." And it was held, that the innuendos in the body of the libel, explaining the words to mean the Pretender, and his hereditary right to the crown of Great Britain, were, when connected with the previous averments, sufficient to verify the charge.

* 5 St. T. 590. 3 Ann. 1704.

† 9 St. T. R. 692.

In the King v. Horne*, the libel, as stated in the information, was averred to be of and concerning his said Majesty's government, and the employment of his troops. The libel, as set forth in the information, advertised a subscription for "the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, and preferring death to slavery, were, for that reason only, inhumanly murdered by the King's (meaning his said Majesty's) troops at or near Lexington and Concord, &c. in the province of Massachusets." The defendant having been found guilty, objected, in arrest of judgment, that there was no averment as to the state of the Massachusets colony at that time, or that the King had sent any troops there, or that the employment of the troops was by the King's authority.

Lord C. J. De Grey, in giving judgment, observed, "The words in the present case are, that the defendant, of and concerning the king's government and the employment of his troops, said, 'that innocent subjects had been inhumanly murdered by the king's troops, for preferring death to slavery.' Do these words import, in their natural and obvious sense, that the king's troops were employed by the act of government inhumanly to murder the king's innocent subjects? There can

* Cowp. 682.

be no doubt but that the king's government comprehends all the executive power both civil and military, that he employs all the national force, and that his troops are the instruments with which part of the executive government is to be carried on. The introductory part of this information charges that the subject of the writing in the present case was, 'the troops and the king's troops, and the business they had done'.

"It has been truly said, that the king's troops may, like other men, act as individuals, but they can be employed as *troops* by the act of government only. If the averment, therefore, amount to this, that in the discourse which was held, the words were said 'of and concerning the king's government,' the natural import appears to us to be this: 'I am speaking of the king's administration, of his government relative to his troops, and I say, that our fellow-subjects, faithful to the character of Englishmen, and preferring death to slavery, were, for that reason only, inhumanly murdered by the king's order, or the orders of his officers.' The motive imputed tends to aggravate the inhumanity of the act, and consequently of the imputation itself, because it arraigns the government of a breach of public trust, in employing the means of the defence of the subject in the destruction of the lives of those who are faithful and innocent.

"As to any other circumstances not stated in

the information, if those which are stated, do of themselves constitute an offence, the rest supposed by the defendant, whether true or false, would have been only matter of aggravation, and not any ingredient essential to the constitution of the crime, and therefore not necessary to be averred on the record."

With respect to words published in a foreign language, and phrases or terms whose use is confined to a particular district or class of people, and not generally understood, it has, as already observed, been said, that no averment as to their meaning is necessary *. This doctrine seems nevertheless a little extraordinary, since, without such an explanation, the question of law does not appear open upon the record†. Suppose, for instance, an action brought for calling the plaintiff *Idoner* ‡, without any averment of the meaning of the term, and that the defendant demurred; since an acquaintance with the Welch tongue forms no part of legal education or practice, the judges might be placed in a strange situation if bound to give their judgment upon the legal meaning of the words; but an averment, as to the meaning, would preclude all doubt, since, by his demurrer, the defendant would allow that the meaning of the word

* See 1 Will. Saund. n. 242.

† Hob. 126. 1 Roll. Ab. 86. Zenobio v. Axtell, 6 T. R. 162.

‡ In Welch signifying perjured.

was *perjured* or *forsworn*, as alleged in the declaration, and judgment would be given accordingly.

If the plaintiff undertake to translate, and render a foreign word of an actionable sense, by an English one whose meaning is not actionable, the declaration will be defective *.

In the case of Ross v. Lawrence, the plaintiff averred that the word *Idoner* in Welch signified *forsworn*, though in fact it meant *perjured*; and after a verdict for the plaintiff, judgment was arrested.

After these observations upon the general nature of these averments, it may be proper to subjoin a few remarks upon their application to the different classes of actionable words which have been above enumerated.

It has been observed, that it is in no case necessary to introduce upon the record any collateral circumstance, connected with the imputation, which is assumed by the defendant's words. Thus, in declaring for the words, "I will call him in question for poisoning my aunt," there needs no averment that the aunt was poisoned †.

Formerly, indeed, a very considerable degree of precision was required in pleading, when the words imputing the commission of a crime related to any extrinsic facts. "Thus, in declaring for the words,

* Sty. 236. Ross v. Lawrence.

† Cro. Eliz. 569. 823.

"Whosoever he is, that is the falsest thief and the strongest in the county of Salop, whatsoever he hath stolen, or whatsoever he hath done *, Thomas Haselwood is falser than he," it was held necessary to aver that there were felons in the county of Salop. But this resolution is to be attributed to the anxiety of the courts to discourage such actions; it seems pretty clear that at the present day no such averment would be deemed necessary.

It would be sufficient to aver that the defendant, intending to charge the plaintiff with felony, spoke the words; and in setting them out, to add an innuendo to the same effect, in which case a verdict for the plaintiff would be conclusive as to the defendant's meaning and intention.

The introduction of useless averments is in all cases objectionable, inasmuch as it encumbers the plaintiff's case upon the trial with unnecessary proof, and in some instances the superfluity may prove fatal to the declaration.

In the case of Snag v. Gee †, where it appeared upon the record that the person, with whose murder the plaintiff had been charged by the defendant, was still alive; it was held that no action was maintainable.

So, in cases where a felony is charged, it is

* Shepp. Ac. 269.

† 4 Rep. 16. 1 Viu. Ab. 409. pl 4.

unnecessary to make any averment, introducing any circumstances relating to a felony actually committed; so, with respect to imputations of forgery or perjury, where the meaning can be collected from the defendant's own words, no averment ought to be made as to the existence of any circumstance to which the defendant might by possibility allude, since it has been long settled that their existence is perfectly immaterial to the maintenance of the action *.

But in case of a charge of forswearing, unless from the accompanying words, it is clear that a judicial forswearing was meant, the plaintiff must shew upon the record that the defendant alluded to some particular forswearing which amounted to perjury. Thus, in a declaration for saying, "†A.B. being forsworn, compounded the prosecution." No introduction of extrinsic facts is necessary, since an indictable forswearing must have been meant; but in declaring for the words‡, "He has forsworn himself in Leake Court," it is necessary to shew that Leake Court was one in which the offence of perjury could have been committed.

Where, from the context, the import of the words is doubtful, it is adviseable to insert those only which certainly are actionable, in order to avoid

* Vid. supra, 85.

† Cro. Eliz. 609.

‡ 1 Roll. Ab. 39. pl. 7. 6 Bac. Ab. 207.

all doubt upon the record, which may be taken advantage of by demurrer, or by motion in arrest of judgment, or by writ of error.

Thus, in an action brought for the words*, "*Mr. Brittridge is a perjured old knave*, and that is to be proved by a stake parting the land of H. Martin and Mr. Wright." After a verdict for the plaintiff, the defendant succeeded on a motion for arresting the judgment; for though it was held by the court that the words in italics were actionable, they were of opinion that their force was explained away by the latter, which shewed that no judicial perjury was mentioned; so that had the latter words been omitted, the plaintiff would have retained his verdict.

In the description of the special character in which the plaintiff sues, some nicety is to be observed, in not averring more than is necessary; for, since the averment of character is material, the plaintiff upon the trial will be bound to prove it, with all the circumstances with which the description in the declaration is encumbered, though a much more simple one might have sufficed.

In an action for words, the plaintiff† declared that he was *in medecinis doctor;* and it was moved in arrest of judgment, because he did not shew that he was licensed by the College of Physicians, or

* 4 Co. 18.

† Dr. Brownlow's case, Mar. 116. pl. 3. 1 Vin. Ab. 539.

that he was a graduate of one of the universities according to the statute*. But Bankes, C. J. and Crawley, J. were of opinion that the act was a general one, which need not be pleaded.

And even had the statute been a private one, it seems that the plaintiff in such an action would not be bound to set out his title, since, in general, in an action on the case against a wrong doer for a disturbance, it is sufficient for the plaintiff to allege his right *(habere debet)* generally, without shewing a title †.

And in an action brought by a physician, it is sufficient to aver ‡ that he had used and exercised the profession of a physician; but if he were to aver that he was a physician, and had duly taken the degree of doctor of physic, he would at all events be required to prove his degree as stated §; and if he were unable to prove it, he would fail.

But though the plaintiff need not aver how he came by his title, he must describe it in apt terms. Thus, in an action brought by a barrister, he ought to aver that he is *homo conciliarius;* and it is not sufficient to say that he is *eruditus in lege* ‖.

It was formerly held, that it was necessary for a

* 14 H. 8. c. 5.

† 2 Vent. 292. Cro. J. 43. 123. Com. Dig. Pleader, c. 39.

‡ 8 T. R. 305.

§ 8 T. 303. 1 N. R. 196. 2 Buls. 230.

‖ 1 Vin. Ab. 539. pl. 2.

tradesman * to aver in an action for words of his occupation or trade, that he got his living by buying and selling; but this arose from the idea, that the words, to be actionable, must import bankruptcy, and must be applied to a person who was liable to the statutes of bankruptcy, and has long been exploded †: it is sufficient to aver that the plaintiff exercised the trade, and derived profit from it.

Next, it should appear that the special character belonged to the plaintiff at the time of the publication. So little precision has been required as to this statement, that it has been held that the averment by the plaintiff, that he is of such a trade, or has exercised it for divers years ‡, without saying *ultimo et jam elapsos*, or that he is a freeman, exercising the art or mystery of a linen-draper for the space of five years past, or that he has been an attorney § for divers years now elapsed, was sufficient, without an express averment that he was such at the time the words were spoken, since it is not to be presumed that a man alters his trade or profession.

In the case of Dodd v. Robinson ||, the plaintiff declared that he was inducted into a parsonage in

* Sid. 299. 1 Vin. Ab. 539. According to Coke, C. J. the technical description is *homo conciliarius et in jure peritus.*

† Vide supra, 134, 135.

‡ Tuthill v. Milton, Yel. 159.

§ 2 Roll. R. 84. 1 Vin. Ab. 538.

|| All. 63, 64. 1 Vin. Ab. 538. note to pl. 3.

Ireland, and executed the office of pastor for four years after. It was moved in arrest of judgment, that he did not aver that he was a parson at the time of speaking the words.

But the court said, it should be intended that he continued parson, because he had a freehold in the parsonage during his life.

In the case of Tuthill v. Milton *, the court said, that in an action for words which affect the plaintiff in his office which he holds during pleasure, it must be expressly averred that he was in the office at the time the words were published; but that if the words relate to his profession or trade, it is sufficient to aver that he has for some years past exercised the profession or trade, for that it shall not be intended that he has discontinued such profession or trade.

But in the subsequent case of Collis v. Malin †, where the plaintiff declared that he had, for a great while, used the trade of buying and selling cattle, and that the defendant said of him, "Thou art a bankrupt." After verdict for the plaintiff, judgment was arrested.

After verdict, indeed, if the continuance can be collected from any averment or circumstances, the want of a precise and technical allegation will be cured.

* Cro. Jac. 222. Yelverton, 159.

† Cro. Car. 282. See also 2 Roll. 84. Dan. 170.

As, where the plaintiff, after alleging that he *was* a justice* of the peace for the county of Leicester, for divers years, averred that the defendant spake these words of him, *being a justice of the peace.*

So the continuance may be collected from the words themselves; as if the defendant say of an attorney, that "he plays with both hands †."

In the proceeding by writ of scandalum magnatum, the plaintiff declares *tam pro domino rege quam pro seipso*‡, though he is entitled to the whole of the damages recovered.

It has been held §, that the statute 2 R. 2. st. 1. c. 5. is a general law, and that the plaintiff need not recite it in his declaration; but that if he undertake to recite it and vary from it in any material point, the declaration will be bad.

* Sir Thomas Beaumond v. Sir Henry Hastings, Cro. J. 240.

† 2 Roll. 85.

‡ 6 Bac. Ab. 100. 1 P. Will. 690.

§ 4 Co. 12. b. Cro. Car. 136. Com. Dig. Defam. B. 3.

CHAPTER XXI.

Averment of Malice.

SINCE a malicious intention to injure the plaintiff forms an essential ingredient in this species of action, it seems necessary to introduce into every declaration an averment of the defendant's malice.

No precise and prescribed form of words is requisite for this purpose, though the epithet malicious, as applied to the matter published, and the word, maliciously, to the act of publishing, are the most usual and appropriate terms.

Any form of words will suffice, from which a malicious intention can be inferred; thus it has been held sufficient to aver, that the defendant spoke the words, or published the libel *falsely* or *wrongfully**, or that the defendant, *machinans pejorare dixit*†.

And Holt, C. J.‡ was of opinion, that in a declaration it is not necessary to use either the word

* Moor, 459. Ow. 51. Noy, 35.

† Danv. 166. Com. Dig. tit. Defam. G. 5.

‡ Sty. 392.

falsely or *maliciously*, though it is otherwise in case of an indictment or information. But it is suggested by Mr. Serjeant Williams, in his notes on Saunders *, that this must be taken to mean that the omission would not be fatal after verdict.

But such words, it seems, are essential in indictments and informations †.

It has been the fashion with pleaders, both ancient and modern, to deal so profusely in the evil motives and intentions attributable to the defendant, that few cases are to be met with where any objection has been taken, for want of an averment of this nature.

It does not appear to be necessary ‡ for the plaintiff to make any averment by way of exculpation, since it is incumbent on the defendant, in case he mean to rely on the justice of the charge in his defence, to plead the justification specially, and he cannot give it in evidence under the general issue.

And perhaps the averment of innocence, on the part of the plaintiff, of the charge cast upon him, or of the falsity of the defendant's publication, would be considered as unnecessary, on account of the general presumption which the law entertains of a man's innocence till the contrary be made to appear. Formerly, however, it was held incum-

* 2 Will. Sau. 242.

† Sty. 392. Per Roll, C. J. 1 Vin. Ab. 533. pl. 3.

‡ 2 Wils. 147.

bent upon the plaintiff not only to aver the falsity of the charge in general terms, but also to negative particular facts contained in the publication complained of; for instance, where the slander was published as heard from another *, it was held necessary to aver that the defendant had not heard it.

In Hooker v. Tucker †, it was held by Holt, C. J. that in a declaration for these words of a trader, "He is a pitiful fellow, and not able to pay his debts." There needed no averment that he was no pitiful fellow, and that he was able to pay his debts.

So, in Bendish v. Lindsey ‡, where the action was brought for charging the plaintiff with bribery at an election, the defendant, holding up some guineas in his hand, said of the plaintiff, who was a candidate, "These guineas are Mr. Bendish's money, and were given me to vote for him; he has bought my vote, and he shall have it." It was objected in arrest of judgment, after verdict for the plaintiff, that it was not averred throughout the whole pleading, that the plaintiff did not give the money. But Holt, C. J. said, it need not be averred that the plaintiff did not give the money, for it is said, *hæc falsa ficta malitiosa verba*, which is well enough.

* Morrison's case, Sheppard, Ac. 267.

† Holt, R. 39.

‡ 11 Mod. 194.

The falsity of the charge may be implied from the averment that it was made *ex malitia*, since the term, in its legal sense, imports a publication without legal excuse *.

Where a party repeats the slander of another, knowing it to be false, and that the author has retracted his assertion or opinion, it seems an action is maintainable against the reporter, though, at the time of publication, he announced the name of the person from whom he heard it; but in such case, it would be necessary to aver the defendant's knowledge, in the declaration; for, if the fact or circumstance were not to be averred in the declaration, and the defendant pleaded that he gave the plaintiff a cause of action by naming his author, the plaintiff might be considered as precluded from replying that the defendant maliciously published the slander against his own knowledge and conviction; for if he could reply it, issue must necessarily be joined upon the fact of knowledge, which has been held not traversable.

Thus, in the case of Sir G. Gerrard v. Dickenson †, the action was brought for publishing a lease, knowing it to be counterfeit, and thereby hindering the plaintiff from letting his land; the defendant pleaded, that she found the lease, and traversed her *knowledge* of the forgery; and

Sutton v Johnson

* ~~Johnson v. Sutton~~, 1 T. R. 493. 4 Cro. Car. 27.

† 4 Rep. 18.

plea was held insufficient, because the knowledge of the forgery is not traversable, any more than the *sciens* in an action on the case, where the defendant's dog has bitten the plaintiff's cattle, and where the plaintiff avers that the defendant knew that the dog was accustomed to bite sheep. The objection to traversing the *scienter* assigned is, that it is no direct allegation, nor ever alleged in any *place*, and therefore cannot be tried *. This objection on the score of locality ceased indeed, when it was no longer required that the venire should be awarded from the vicinage; and there seems to be no very satisfactory reason why a party in pleading should not confine the evidence by traversing any distinct circumstance which is essential to his adversary's case, and which must be proved upon the trial. Since, however, the technical objection to traversing the *scienter* has not been judicially defeated, it would not be proper to omit the averment of knowledge in the declaration, in a case where it is material; as, where a party has repeated slander, knowing the author to have been convinced of his error, or sets up a lease which he knows to be a forgery, for the purpose of injuring the plaintiff.

Where particular circumstances have been introduced, to shew the defendant's conduct to have been malicious, it will be necessary to prove them upon the defendant's pleading the general issue†.

* 4 Rep. 18. † 2 East, 437.

CHAPTER XXII.

Of Damage.

THE defendant's wrongful act having been considered, the next question is, as to the statement of the loss to the plaintiff resulting from it.

Where the words are intrinsically actionable, the loss to the plaintiff is, as has been seen, a mere inference and presumption of law; and it does not seem necessary for the plaintiff to aver that the words complained of amount to the charging a precise crime; since their actionable quality is a question of law, and not of fact, and will be collected by the court from the circumstances, if they warrant it *. But in such case, it may frequently be adviseable to aver special damage to have been sustained in consequence of the words; such an averment will not prejudice, since it will not be necessary to prove it on the trial. If no such proof be then given, and the jury give a general verdict, the defendant, if it should be necessary afterwards in order to enable him to move in arrest of judgment, may have the verdict amended by confining

* See Peake v. Oldham, Cowp. Rep. 275.

it * to the actionable words according to the judge's notes.

Formerly it was held† that, where the words were not actionable, but the special damage was the gist of the proceeding, such special damage might be given in evidence, although the particular instances of the special damage were not stated in the declaration; but that, when the words themselves were actionable, particular instances of such damage could not be given in evidence, unless specified on the record.

But modern practice ‡ does not warrant this distinction, and at the present day it seems that in both cases the particular damage must be specified.

The general rule of pleading, as to special damage, is, that it must be averred with that degree of certainty and particularity which the case admits of, in order that the defendant may be apprized what it is he comes to answer, though in some cases where particularity would be productive of inconvenience, and the circumstances are not immediately within the knowledge of the party, a more general statement has been deemed sufficient.

Thus the averring generally, that by means of

* This is done at Chambers, as of course, without a motion in court.

† 1 Str. 666.

‡ B. N. P. 7. 1 Will. Saund. 243. n. 5.

the publication, several customers (not naming them) left the plaintiff's house, is not sufficiently precise *.

And so, where the alleged damage consists in loss of marriage †, the plaintiff must point out the individual with whom the marriage would otherwise have been contracted.

And for the same reason, where the plaintiff states a marriage with J. N. to have been hindered, she cannot afterwards give in evidence loss of marriage with any other person ‡.

But it has been said, that greater certainty is requisite where the special damage is the gist of the action, than where it is merely laid by way of aggravation §.

Where the special damage consists in the || plaintiff's having been prevented from disposing of, or settling his estate, it is necessary to shew how he was prevented, as that he had taken some steps for the purpose of selling, and that the bidding was stopt by the defendant's act; but it is unnecessary to specify the names of any of the bidders.

* B. N. P. 7. 1 Roll. Ab. 58.

† 1 Sid. 396. 1 Vent. 4. Cro. J. 499. 12 Mod. 597.

‡ Lord Ray. 1007.

§ Per Cur. in Wetherell v. Clerkson, 12 Mod. 597. 2 Lut. 1295.

|| Smead v. Badley, Cro. J. 397. Sir W. Jones, 196.

Where the plaintiff, who had been a preacher in a chapel to a dissenting congregation, averred generally in the declaration, that by reason of the words the persons who frequented the said chapel had refused to permit him to preach there, and had discontinued giving him the gains and profits which they had usually given and otherwise would have given; the court held on motion in arrest of judgment, that where a plaintiff brings an action for slander, by which he lost his customers in trade, he ought, in his declaration, to state the names of these customers, in order that the defendant may be enabled to meet the charge, if it be false; but that in the principal case, the plaintiff could not have stated the names of all his congregation, and that it was sufficient to say that he had been removed from his office, and had lost the emoluments of it.

Where actionable words are spoken, within the scope of a private jurisdiction, the declaration may allege a consequential loss of customers by a place beyond the limits of such jurisdiction. For the allegation is only in respect of damages to ingross them, and may be inquired of in any place whatsoever ‡.

Where the words are in themselves actionable, and the character of the plaintiff is stated in aggra-

* Hartley v. Herring, 8 T. R. 130.

† 4 Burr. 2424.

‡ Ireland v. Blockwell in error, Cro. C. 570.

vation; it is not necessary to state the circumstances of that situation with so great certainty as where it is essential to the action. Thus, where the words are spoken of a candidate to serve in parliament, it is sufficient to state the fact generally, and unnecessary to set forth the writ to the sheriff *.

In general †, the place where the words are spoken is immaterial; yet, if the plaintiff state the place by way of aggravation, and not merely as venue, it seems he will be bound to prove the speaking to have been in the place named.

With respect to joining different injuries in the same proceeding, words spoken at different times may be included in the same count.

In such case, however, if it should appear on the face of the count that the words were spoken at different times, and that some of them were not actionable, judgment would be arrested if entire damages were given for the whole count.

And it seems a count for verbal slander ‡ may be joined with a count for a libel in the same declaration. And the causing § a plaintiff to be brought before a magistrate may be joined with a complaint for a malicious accusation before the magistrate.

* Harwood v. Sir J. Astley, 1 N. R. 47.
† B. N. P. 5.
‡ King v. Waring and uxor, 5 Esp. R. 13.
§ Cro. Car. 271.

CHAPTER XXIII.

Of the Defendant's Plea.

THE principal circumstances of which the defendant may avail himself in resisting an action for slander, have already been sketched out; the technical mode of answering the plaintiff's claim upon the record is next to be considered.

Under this division it may be inquired, first, what *must be pleaded;* secondly, what *may be pleaded;* and thirdly, *how it should be pleaded.*

1st. What must be pleaded.

Since an action upon the case is founded on the justice and equity of the plaintiff's claim, it is a general rule that whatever will, in equity and conscience, preclude the plaintiff from recovering, need not be pleaded, but may be given in evidence under the general issue *. In the particular case of an action for slander, if the instances be excepted where the defendant relies on the truth of the imputation, or the plaintiff is barred by the statute of limitations, there does not appear to be any defence of which he may not avail him-

* Burr. 1353. 1 Bl. R. 388. 1 Wils. 45.

self under the general issue; since, in every other case where the plaintiff is not entitled to recover, he must fail from his inability to substantiate in evidence the two leading circumstances whose union is essential to the action, the wrongful act of the defendant, and the loss resulting to himself; these, in all cases where the general issue is pleaded, he must prove upon the trial, and in default of such proof, would be liable to a nonsuit; and where he has established a *primâ facie* case, it seems equally competent to the defendant to controvert and overthrow it by opposite evidence. Where the defendant insists that the plaintiff is not entitled to recover, because he is really guilty of that wherewith he has been charged, the justice of the case imperatively requires that the plaintiff so taxed with an offensive or criminal imputation, which his adversary proposes to substantiate against him in evidence, should be apprized by means of a special plea, of the nature and circumstances of the charge, that he may be fully prepared to answer it in court.

The rule of law upon this head has long been settled, that the defendant, if he mean to rely upon the truth of that which he has published, either in bar of the action or in mitigation of damages, must plead it specially.

Formerly a distinction was made in this respect between words imputing an offence generally,

and such as charged a particular and specific one.

In the case of Smith v. Richardson*, the twelve Judges were unanimously of opinion, that where the words import a general felony, as "Thou art a thief," or "Thou stolest a horse," or any other thing not specifying the person from whom or when and where it was stolen, the defendant ought not, upon the general issue, to be allowed to give the fact in evidence to mitigate damages. The words in the principal case were, "John Smith is a rogue, and hath stolen my beer; John Smith has robbed me of my beer." And eight of the Judges were of opinion, that in no case whatever where the words imported felony or treason, such evidence ought to be admitted on not guilty pleaded; but four were of opinion that it might, where the words imported a particular felony.

But in the case of the Bishop of Salisbury v. Nash, quoted in the above case, which was an action for saying of the plaintiff, "He preacheth nothing but lies in the pulpit." The defendant pleaded not guilty, and his counsel offered to give evidence of the truth of the words in mitigation of damages; but Lord Macclesfield refused to admit it with great indignation.

Where a particular offence not capital was charg-

* Willes, 20.

ed*, evidence of the truth was allowed under the general issue.

But, in the case of Underwood v. Parkes, the defendant pleaded not guilty †, and offered to prove the words to be true in mitigation of damages, which the Chief Justice refused to permit, saying, that at a meeting of all the Judges upon a case that arose in the Common Pleas, a large majority of them had determined not to allow it for the future, but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words. That this was now a general rule amongst them all, which no Judge would think himself at liberty to depart from; and that it extended to all sorts of words, and not barely to such as imported a charge of felony.

Where the justification arises from the occasion on which the words were published, or from the particular character of the author, it seems unnecessary to plead the defence specially, since the nature and essence of the defence is the absence of that malice which is essential to support the action.

Thus, where the words have been spoken, or the alleged libel published, by a member of either house of parliament in the course of his public

* B. N. P. 7. † Str. 1200.

duty*, by a Judge†, acting in his judicial capacity, by a counsellor, in the management of the cause when they are pertinent to the issue, and have been suggested by a client‡; by a witness, in delivering§ his evidence; by a master, in giving the character of a servant‖; or, in short, by any person under circumstances which rebut the allegation of malice¶, the general plea is sufficient. And this principle seems to comprehend the cases where parliamentary or judicial proceedings have been faithfully reported. An action was brought against the editor of the Times newspaper**, for having published a libel on the plaintiff; the publication complained of imported to be an account of an application to the Court of King's Bench, for an information against the plaintiff and Mr. Bingham, both justices of the peace for Hampshire, for refusing to license an inn at Gosport. The defendant pleaded the general issue; and at the trial, after the plaintiff had proved the publication of the paper by him, a person whom he employed to collect legal intelligence for the use of his paper, was called,

* 1 Esp. R. 226. 1 W. & M. st. 2. c. 2.
† 2 N. R. 341.
‡ Cro. J. 90. Poph. 69.
§ Brownl. 2.
‖ 1 T. R. 110. 3 B. & P. 587.
¶ See 1 Will. Saund. 131. n. 1.
** 1 B. & P. 525.

in order to prove that the report was a true and faithful account of what had passed in the Court of King's Bench upon the motion. It was objected on the other side, that the defence ought to have been put upon the record, and could not be given in evidence under the general issue. The objection, however, was overruled by Eyre, C. J. and the jury found a verdict for the defendant. Afterwards a motion was made in arrest of judgment; one ground for which was, that the matter proved by the defendant at the trial had been improperly received in evidence under the general issue, and ought to have been pleaded in bar to the action. After argument, the court doubted upon this point, the case stood over, and no judgment was ever given.

In Astley v. Yonge *, and Stiles v. Nokes †, the latter of which was subsequent to that of Curry v. Walter, the defendants justified specially.

Before the case of Underwood v. Parks ‡, it appears to have been the practice to allow evidence of the truth of the publication in mitigation of damages, generally, and in some instances in bar of the action; which affords an inference that the present defence, which would be much less likely to subject the plaintiff to any inconvenience by way of surprize, was also admissible under the general plea. To the great rule of pleading in action on the case, namely, that

* Burr. 807. † 7 E. 493. ‡ Str. 1200.

the defendant is at liberty, under the general plea, to give every matter of justification or excuse in evidence, the action for slander furnishes an exception in the instance where the defendant relies on the truth of his assertion; and such a defence contains an intrinsic necessity for making it an exception; but here no such reasons oppose themselves to the general rule; there is no room for surprize, since the plaintiff is informed by the publication itself that it purports to be a report of a parliamentary or judicial proceeding. It seems difficult to assign a distinction in principle between this case and those where the words are spoken in the course of a judicial proceeding, by a judge, counsellor, or witness, in the latter, since the law excludes the idea of malice, the situation of the party is evidence under the general issue; and the reason applies with equal force to the defence in question, where the law protects the defendant on grounds of public expediency in the fair publication of judicial or parliamentary proceedings, and will not permit his conduct to be attributed to malice.

It does not appear that a defendant, who repeated the slander of another, and who has given up his author, is under the necessity of pleading the matter specially *. The defence in such case does not depend upon naming the author and his scandal in the plea, but is grounded entirely on the

* 7 T. R. 17. 5 East, 463.

circumstance of the defendant's having, at the time of publication, supplied the plaintiff with the means of obtaining a remedy against a former publisher.

The situation of a person thus lending his aid to an injured party, repels, at least, in the first instance, if it does not wholly obstruct the inference of legal malice.

In an action for words *, alleging loss of marriage with J. S., the defendant, under the general issue, offered to prove that J. S. was the plaintiff's aunt; but it was held that the evidence was inadmissible, that the right to marry could not then be tried, and that it was sufficient if they intended to marry; and that the woman, for that cause, refused.

It seems difficult to support this decision on legal principles, since the preventing that, which could not legally have taken place, can scarcely be considered as a damage for which the plaintiff is entitled to recover a compensation.

But, 2dly, though the defendant may, with the exceptions mentioned, reserve his defence till the trial, he frequently has it in his election to answer the plaintiff specially upon the record. And the rule, as laid down down in the fourth report, is, that *the defendant* † *shall never be put to the general issue, when he confesses the words and justifies them*, or

* The case of Sir C. Gerard's bailiff, B. N. P. 7.

† 4 Co. 14. Pop. 66.

confesses the words, and by special matter shews that they are not actionable.

Since the plaintiff's ground of action consists of the defendant's having maliciously published concerning him that which has occasioned temporal prejudice, and according to the foregoing rule, the publication of the actionable words must be confessed, it follows that the defendant may plead any matter in bar which either rebuts the malice, or shews that no damage, either presumptive or actual, has been sustained.

Where the defendant has uttered the alleged slander in a judicial proceeding*, or in correctly reporting parliamentary or judicial proceedings, he may justify by pleading the fact, since in these cases the presumption of law is conclusive in favour of the defendant; so where the defendant, at the time of publication †, gives up his author, unless it appear that he really knew the charge to be false, the presumption is equally strong in his favour, and he may plead the fact for the purpose of rebutting the averment of malice.

So, where a barrister ‡, in the course of a cause, asserts that which is relevant to the issue, and has been suggested by his client.

In other cases, though the inference of malice may be rebutted on the trial, as by shewing that the party had an interest, or was giving the cha-

* Cro. Eliz. 230.

† 7 T. R. 17. 5 East, 463. ‡ Cro. Jac. 90.

racter of a servant, yet it does not appear that the matter can be exhibited upon the record, since the character in which the defendant alleges himself to have acted is not *conclusive as to his intention*, and amounts at most to a simple negation of malice, which is included in the general issue.

The damage sustained is either the legal damage, *presumed* by law in the case of words intrinsically actionable, or an *actual* damage to be proved in evidence; and in either case the defendant may shew, by his plea, that none has been sustained; and this may be done in the first instance, either by the introduction of new matter, or by a traverse of facts already stated, shewing that the terms complained of were not used in an actionable sense.

Thus it has been held, that in an action for calling the plaintiff a murderer, it may be pleaded that the word was used in the course of a conversation about unlawful hunting, and that the words merely imported that the plaintiff was a murderer of hares *. So, where the plaintiff declared upon an imputation of an unlawful maintenance, it was held that the defendant might justify, by shewing that the words were used in reference to a lawful maintenance †.

So, in the case of Kinnersley v. Cooper ‡, the plaintiff declared that he had taken an oath, which

* 4 Rep. 14. † Cro. Jac. 90.

‡ Cro. E. 168. b. Rep. 14.

was recorded in the court of the Guildhall, in a judicial proceeding; and that the defendant, speaking of that oath, had said, that he had sworn falsely. The defendant, in his plea, denied that any such oath had been taken; and the plaintiff demurred, on the ground that the taking the oath was but conveyance to the action, and not traversable; and secondly, that the plea was bad, since it amounted to the general issue. But the justices were of opinion that the matter was traversable, since the action was grounded upon it.

In the case of Lord Cromwell v. Denny *, the plaintiff declared in scandalum magnatum against the defendant, for having charged him with liking those who maintained sedition.

The defendant pleaded that he was vicar of Northlinham, which was a benefice with the cure of souls; and that the plaintiff procured J. T. and J. G. to preach severally in the church of Northlinham; who, in their sermons, inveighed against the book of Common Prayer, which was established by the Queen and the whole parliament in the first year of her reign, and affirmed it to be superstitious and impious; upon which the plaintiff and defendant, speaking in the said church of these sermons, because the vicar knew that they had no licence, nor were authorized to preach, when they were ready to preach, before their sermons, forbade

* 4 Rep. 14.

them, but they, by the encouragement of the plaintiff, proceeded, when the plaintiff said to the defendant, "Thou art a false varlet, I like thee not." To which the vicar said, "It is no marvel that you like not of me, for you like of these (innuendo the said J. T. and J. G.) that maintain sedition against the queen's proceeding." It was moved by the plaintiff's counsel that the plea was bad, since, if the matter contained in it amounted to a justification, then, upon the dialogue between the parties, the defendant was not guilty, and that he ought to have pleaded so, and given the matter in evidence. But the court held, that the defendant had done well to shew the special matter by which the sense of the word sedition appears, upon the coherence of all the words, not to mean any violent and public sedition, as it had been described to mean, and as *ex vi termini* the word itself imports.

In these and similar cases, the effect of the justification is to shew, that there was no *legal* damage, the terms not having been used in an actionable sense; and it seems that it is equally open to shew by special matter that no *actual* damage has been sustained for which an action is maintainable.

Thus, in the case where the plaintiff alleged that by reason of the words he had lost his marriage with J. S. the defendant might plead that J. S. was

aunt to the plaintiff: but the plea of *non damnificatus* generally would be bad *.

To these pleas, some of which must, and others may be pleaded, has been added the plea of minority, or at least, that the defendant was within the age † of seventeen; but this is contradicted by the observation of Mr. Justice Lawrence in Woolnoth v. Meadows ‡; and Lord Kenyon expressly stated, that if an infant § utter slander, he is responsible for it in a court of justice. When the words, as stated upon the record, appear demurrable, it may be useful to apply the rule which Sir E. Coke termed "an excellent point of learning in actions for slander," namely, "observe the occasion and cause of speaking of them, and how it may be pleaded in the defendant's excuse. When the matter in fact will clearly serve for your client, although your opinion is, that the plaintiff has no cause of action, yet take heed you do not hazard the matter upon a demurrer, in which, upon the pleading and otherwise, more perhaps will arise than you thought of, but first take advantage of matters of fact, and leave matters of law, which always arise upon the matters of fact *ad ultimum*, and never at first de-

* Dyer, 26.

† Com. Dig. Pleader, 2. L. 2.

‡ 5 East, 471.

§ 8 T. R. 337. See also Bac. Ab. tit. Infancy.

¶ 4 Rep. 14.

mur in law, when after trial of the matters in fact, the matter in law will be saved to you."

Where the action is brought for claiming title to an estate, by means of which the plaintiff is prevented from selling or letting it, and the declaration alleges that the defendant asserted a false title, *knowing it to be false*, if the defendant has in fact any colour of claim, he should plead the general issue, by which means the plaintiff * will be obliged to prove, on the trial, that he knew it to be false, and it is said that the fact of knowledge cannot be traversed in pleading †.

Thirdly, How it must be pleaded.

Observations upon the manner of pleading relate to the plea of justification generally, to particular pleas, or to the joinder of different pleas.

1. To the plea of justification generally.

The plea of justification in general must confess the publication as laid in the declaration, otherwise it will be bad on demurrer ‡; and this is an immediate consequence resulting from the great rule of pleading, which requires the party pleading either to confess the previous matter, and avoid it, or to traverse it.

In Johns v. Gittens §, the words laid in the declaration were, "Thou hast played the thief with

* 2 East, 437.

† 4 Co. 18. Cro. J. 398.

‡ Jon. 307. Cro. Eliz. 153.

§ Cro. Eliz. 239.

me, and hast stolen my cloth and half a yard of velvet." The defendant pleaded, that the plaintiff was his tailor, and that upon such a day he delivered to him a yard and a half of velvet, to make him a pair of hose, and he made them too straight; by reason whereof he spoke these words, "Thou hast stolen part of the velvet, which I delivered you," denying that he spoke any words *aliter vel alio modo*.

The plaintiff demurred, and it was held that the plea was bad, for not confessing the words laid in the declaration *.

If the defendant justify specially, it will not be necessary for him in his plea to deny the innuendos and epithets contained in the declaration; for if the fact be justified †, the motive intended and manner are immaterial. Unless, from the particular occasion of speaking the words, the day, or the place, become material, the plea should adopt the day and the place stated in the declaration without a traverse; but when they become material, and differ from those stated in the declaration, the plea should traverse the speaking of the words on the day or at the place laid in the declaration. Thus, if the plaintiff declare of words spoken at B., in the county of Salop, and the defendant mean to justify the publishing them in a judicial

* See also Cro. Eliz. 153, Bellingham v. Mynors.
† Burr. 807.

proceeding at Westminster, he should traverse the publishing them at B., in Salop, at any time.

The special plea of justification, grounded upon the *truth* of the publication, may be considered, *first*, with reference to the matter contained in the plea; and *secondly*, with regard to the charge complained of in the declaration.

The same degree of certainty and precision are required in this plea as are requisite in an indictment or information.

In Wyle v. Cookman †, the words were, "Thou wast forsworn in such a leet, on such a day." The defendant pleaded that the plaintiff the same day was sworn with others before the steward, to present, &c. and that they presented such a ditch not scoured *ad nocumentum*, &c. which was false, and so justifies, but did not say that they knew it to be false of their *own proper knowledge*. It was moved on demurrer, that they might have presented it upon evidence. Gawdy and Fenner, Justices, held, that it was properly and commonly to be intended that the presentment was false of their own knowledge, and so perjury; and that if they presented it upon evidence, the plaintiff ought to shew it in his replication. But Popham, J. said, that a man may not justify by intendment; but that it ought to have been pre-

* See the case of Buckley v. Wood, 4 Rep. 14. 1 Salk. 222. 1 Will. Saund. 82. n. 3.

† Cro. Eliz. 492.

cisely alleged. But there was another defect in the plea, which was held by all the justices to be incurable, namely, the want of an allegation that the ditch was within the leet; for if not, then the presentment thereof was out of their charge, and there was no perjury.

Where the original charge is in itself specific, the defendant need not further particularize it in his plea. In an action on the case * for calling the plaintiff thief, and saying that he stole two sheep of J. S. the defendant pleaded that the plaintiff stole the same sheep, by reason of which he called him thief, as well he might; and the plea was held good.

Secondly, as to the nature of the plea, with reference to the words laid in the declaration. Though the charge imputed to the plaintiff be general, as laid in the declaration, the defendant must, in his plea, charge him with specific ‡ instances of offences of the same nature with the general charge. Thus a defendant is not at liberty to charge a person with swindling, without shewing specific instances of it; for whenever one charges another with fraud, he must know the particular instances upon which his accusation is founded, and therefore ought to disclose them.

1 Term Rep 478

* Br. action sur cas. 27 H. 8. 22. pl. 3.

† 1 Roll. Ab. 87.

‡ Styles, 118. Strachey's case.

In Morris v. Langdale *, which was an action for calling the plaintiff (who was a stock-jobber) a lame duck, the defendant justified, pleading generally that the plaintiff had not fulfilled his contracts. Upon demurrer, Lord Eldon, C. J. observed, that it had been strongly argued in support of the demurrer to the plea, that in consequence of its generality the plaintiff must proceed to trial at the hazard of being able to produce evidence applicable to any contract which he ever made. But the declaration itself was defective, and the plaintiff had leave to amend.

In Newman v. Bailey †, the plaintiff, a justice of the peace, brought an action against the defendant, for having charged him with "pocketing all the fines and penalties forfeited by delinquents whom he had convicted, without distributing them to the poor, or in any manner accounting for a sum of £50 then in hand." The defendant pleaded that the plaintiff was a justice of the peace, and that during the time he acted as such, he convicted divers and sundry persons respectively, in divers and sundry fines and sums of money, for and on pretence of their having respectively committed divers respective offences against the form of divers statutes of this realm; which said respective fines and sums of money, amounting in the whole to £50, he received of

* 2 B. & P. 284. † Hil. 16 G. 3. B. R.

the respective delinquents so by him convicted, and had not paid the same to the several persons to whom the same ought to have been paid by virtue of the respective statutes, but had kept and detained the same, &c. To this there was a special demurrer, and the court were clearly of opinion that the plea was bad, because it did not specify any one fine or penalty which had been unjustly levied.†

The matter alleged in the justification to be true, must in every respect correspond with the imputation complained of in the declaration. Thus, where the defendant, in the first instance, charges the plaintiff with having feloniously stolen one kind of chattel, he cannot afterwards justify by pleading that the plaintiff had really been guilty of stealing a different one*. And so with regard to every circumstance at all material, the facts set up by way of justification in the plea must be strictly conformable with the imputation charged in the declaration. The words for which the action was brought charged the plaintiff with having been a bankrupt on the first day of April, in the 17th year of James the First. The defendant pleaded that the plaintiff was a bankrupt on the first day of April, in the 15th year of the same reign, and that therefore he published the words; and the plea was held bad.†

* Hilsden v. Mercer, Cro. J. 676.

† Upsheer v. Betts, Cro. J. 578.

because it was not averred that the plaintiff continued a bankrupt to the time of publishing the words, for he might afterwards recover his credit in trade.

In Fish* v. Thorowgood, the plaintiff declared that a commission issued out of the Exchequer, directed to the plaintiff and one J. S. by force whereof they took and returned the examinations of several witnesses, and that thereupon the defendant said, that the plaintiff had returned as depositions the examination of *divers* that were never sworn. The defendant pleaded in bar, that he did return the examination of one J. S. who was never sworn. Upon demurrer, it was adjudged that this was no good justification in bar, because it is of one witness only, whereas the charge was in the plural number.

Where the offence consists in the defendant's having published the words in the course of a judicial proceeding, the defendant must shew in his plea that he has been guilty of no publication which the nature of the proceedings did not call for, or at least care must be taken that no publication stated in the declaration is left unprotected by the matter of justification pleaded. The defendant † had exhibited his bill in the Star Chamber, alleging that the plaintiff was a procurer of murderers and pira-

* Cro. Eliz. 623.

† 4 Co. 15.

cies; the declaration alleged the exhibiting the bill, and that the said defendant, at B., in the county of Salop, said, that the said bill, and the matters contained therein, were true. The defendant, in his plea, confessed the exhibiting of the bill in the Star Chamber, and that he, in the said court at Westminster, spoke the said words *absque hoc*, that he spoke the words in the county of Salop before or after the day mentioned in the declaration, by which he excluded the day itself, for which reason the plea was held to be insufficient. But judgment for the plaintiff in this case was afterwards reversed upon writ of error in the Exchequer Chamber, because the defendant had asserted in the county of Salop nothing more than that the matters contained in the bill were true, without specifying the contents of the bill.

Where the alleged libel was contained in a petition to the members* of a committee of the House of Commons, the plaintiff, in his declaration, alleged generally that the defendant had published the libel to "divers subjects," the defendant justified the publication to divers persons being members of the committee, and averred it to be the same publishing of which the plaintiff had complained, and the plea was held sufficient. But it seems, that if the plaintiff, in his declaration, allege a publication to divers people by name, if the de-

* Lake v. King, 1 Saund. 130.

fendant justify the publication to some of them by name, he must traverse a publication to the rest.

And the reason of the distinction is, that in the former case, where a general publication to divers subjects is alleged, the plea that he published to divers subjects being members of the committee, is consistent with the declaration, and therefore with the averment that the publication is the same. But if the plaintiff declare of a publication to A. B. C. and D., the defendant, in justifying a publication to A. and B., cannot aver it to be the same publication with that complained of, but should traverse the publication to C. and D.*

Where part of a publication consists of a report of judicial proceedings and the rest of comment, since the separation is necessary for the purpose of defence, the defendant ought † to take upon himself the burthen of making it, in order that the court may see what parts he means to justify. And if he does not, the court will not allow him to amend his plea.

A plea of justification, however, may in such case be good, with a general reference to certain parts of the libel set forth in the declaration, if the court can see with certainty what parts are referred to, as if the reference be to so much of the libel

* See 1 Will. Saund. 133. n. 4, and 22. n. 2.

† 7 East, 492.

as imputes to the plaintiff such a crime as perjury, that would be sufficient without repeating all those parts again, which would lead to prolixity of pleading and ought to be avoided *.

By st. 21 J. 1. c. 16. s. 3. it is enacted, that all actions upon the case (other than for slander) shall be commenced and sued within six years next after the cause of such action or suits, and not after. And the said action upon the case for words within two years next after the words spoken, and not after. It has been held under this statute, that the latter limitation applies to words in themselves actionable, only, and not to cases where †, the special damage is the ground of action, nor to written slander; and it has been decided that cases of scandalum magnatum are not within the latter, though within the former limitation ‡.

It seems now fully settled, that if the defendant mean to avail himself of this statute §, he must in all cases plead it.

Where the words are actionable, the time begins to reckon from the speaking of the words; but where special damage is essential, the damage itself is the cause of action, and not the speaking of the words; in such case, therefore, it seems that it would not be sufficient for the defendant to aver

* Per Le Blanc, J. 7 E. 507.

† 6 Bac. Ab. 241. Cro. Car. 193. Salk. 206. 1 Sid. 95.

‡ Cro. Car. 535.

§ See 2 Will. Saund. 63 a. where this point is fully discussed.

in his plea that he did not speak the words within six years; because, though that was the fact, the cause of action, namely, the special damage, might have arisen within the six years, he ought therefore to plead that the cause of action did not accrue within the limited time. Where, however, the words are in themselves actionable, though special damage be laid, since the words themselves give rise to the action, and the damage is mere matter in aggravation, it would be sufficient to plead that the defendant did not speak the words within the time limited by the statute.

The defendant may, under the statute *, by leave of the court, join a general plea of not guilty to the whole declaration, with a plea of special justification to the whole or part †; and he may plead not guilty as to part of the words, and justify the speaking of the residue ‡.

* 4 Ann. c. 16. † Cro. J. 267. ‡ See Tidd, 603, 4th ed.

CHAPTER XXIV.

Of the Replication.

IT seldom happens that any thing can be replied to the defendant's special plea, except the general replication of *de injuria propria*, &c. which puts the whole of the defendant's plea in issue *.

In some instances, however, a special replication becomes necessary. As, where the original slander imputes to the plaintiff the commission of a specific crime, and the defendant pleads in justification that the plaintiff was really guilty, he plaintiff may reply, that after his commission of the crime, and before the speaking of the words, he was pardoned †.

And it has been said, that in such case it makes no difference whether the pardon be a special one, of which the defendant was ignorant, or a general one, since a man who takes upon himself to spread slander, does it at his peril; but that if a man who had committed felony, secretly procure a pardon, and another, not knowing of the pardon, cause him to be apprehended for felony, he would be justified, because what he did was for the advancement of justice.

* 1 Saund. 244. n. 7. † Cuddington v. Wilkins, Hob. 81.

But where the pardon is general, containing clauses of exception, it seems the plaintiff should aver that his case does not fall within any of the exceptions *.

And even after a pardon, if the defendant merely say that the plaintiff *was a thief*, the pardon † will not be available.

Where the plaintiff has stated the publication generally to have been made to divers persons, not naming them, and the defendant justifies the publication to particular persons as to the members of a committee of the House of Commons, if the plaintiff mean to insist upon a publication to any others, he should state such publication by way of new assignment ‡.

* Hob. 67. † Hob. 82.
‡ See 1 Saund. 133. and Chitty on Pleading, 606.

CHAPTER XXV.

Of the Evidence.

THE course and extent of the evidence to be adduced by the parties at the trial will be considered in the same order with the pleadings by which the evidence is regulated.

First, as to the fact of publication.—Where the action is for words spoken, evidence of the speaking before any third person will be sufficient, though the declaration allege them to have been spoken before A. B. and others *. And where the words are in themselves actionable, it is sufficient to prove some of them which are actionable, provided they be proved precisely as laid †.

If the words be spoken, or libel published, in a foreign language, or in characters not understood by those who hear or see them, there is no publication, since there is no communication prejudicial to the plaintiff; and if the words be spoken, or libel addressed, to the plaintiff only, without further publication, no action is maintainable, since no temporal damage can have accrued from the de-

* B. N. P. 5.

† 2 East, 434. 8 T. R. 150. supra, 309.

fendant's act*, but such a publication would be sufficient to sustain an indictment on the ground of its tendency to produce a breach of the peace.

Where a witness, who heard scandalous words spoken, has committed them immediately to writing, he may afterwards read the paper in evidence, if he swear that the words contained in it are the very words †; and if the words have not been written immediately, the witness may refer to his minutes to refresh his memory ‡.

In case of libel, before any evidence can be given of its contents, *prima facie* evidence must be given of a publication by the defendant. Evidence of a publication is either of a publication *generally*, or of a publication in some *particular county* or place, and it is either *direct* or *indirect*.

The publication may be directly proved, not only by evidence that the defendant, with his own hand §, distributed the libel, or exposed its contents, or painted an ignominious sign over the door of another, or took part in a procession carrying a representation of the plaintiff in effigy for the purpose of exposing him to contempt and ridicule, but also by maliciously reading or singing the contents of the libel in the presence of others; all of which facts are direct proof of the averment that the de-

* 1 Will. Saun. 132. n. 2. 2 Esp. R. 226.

† Per Holt, C. J. Sandwell v. Sandwell. Holt, R. 295.

‡ Ibid.

§ R. v. Almon, Burr. 2689. Seven Bishops' case. St. Tr.

|| 5 Rep. 125. Moor, 813.

fendant published the alleged libel*. But it frequently happens that no direct proof can be given of the defendant's agency in the publication of the libel, and resort must be had to indirect evidence, in order to connect him with the libel, and fix him with its publication. The most usual and important piece of evidence for this purpose consists in proving that the libel published is in the hand-writing of the defendant; when the plaintiff has proved this, he has made out such a *prima facie* case as entitles him to have the contents read in evidence †.

It was observed by a great authority ‡, that "When a libel is produced written in a man's own hand, he is taken in the manner, and that throws the proof upon him; and if he cannot produce the composer, the verdict will be against him."

The grounds of this presumption are plain and reasonable. A man is at liberty to think or to write what suits him; at all events, he incurs no civil responsibility unless he divulge his thoughts to the temporal prejudice of another; but it seems equally clear, as a proposition either of law or expediency, that if he write what is false, and the calumny become public to the detriment of its object, he

* 5 Rep. 125. 9 Rep. 59. b.

† Burr. 2689.

‡ Per Holt, C. J. R. v. Beere, Ld. Ray. 417. Mullett v. Hulton, 4 Esp. 248.

is just as responsible for the effects of his negligence as if he had been the voluntary publisher of the scandal; if a man write libels for his own perusal, he must be content to enjoy the satisfaction diminished by the risk and peril of an accidental publication and its consequences.

The writing a libel* does not, however, in any case, amount to a publication, but is mere evidence from which it may be inferred; what amounts to a publication is a question of fact, falling within the province of the jury to decide †; and though proof that the libel is in the hand-writing of the party, goes far in fixing him with the publication, he is still at liberty to rebut the strong presumption thus raised against him, by reconciling the fact with his own innocence.

The effect of such proof in evidence having been thus briefly considered, it may next be inquired with what degree of certainty and precision the hand-writing of the party must be established before the writing can be read; a matter of evidence most important when considered in its relation to civil suits, wherein the disposition of the fortunes of individuals so frequently depends upon written testimony, but demanding still more serious attention when considered as the medium of proof in cases of libel, forgery, and treason, with the de-

* Lamb's case, 9 Rep. 59. 15 Vin. Ab. 91. Mod. 813.

† Baldwin v. Elphinstone, B. R. 1037.

cision of which offences the security, liberty, and life, of every subject of the realm, are intimately connected.

Upon the memorable trial of the Seven Bishops for an alleged libel addressed to the King*,

Sir Thomas Exton stated, that he had never seen the Archbishop of Canterbury write five times in his life, but that he believed one of the signatures on the paper produced to have been written by the Archbishop.

Mr. Brookes stated, that he believed another signature to have been written by the Bishop of Ely; but upon cross-examination, it turned out that his belief was founded upon the resemblance which the writing bore to that contained in a letter sent to the Bishop of Oxford, which letter the witness concluded to have been written by the Bishop of Ely from having waited upon him with the Bishop of Oxford's answer, and communicated with him on the subject of the original letter.

Upon this evidence, Mr. Justice Powell observed, "That's a strange inference. Mr. Solicitor, prove a man's hand."—Mr. Attorney General—"We have more evidence, but let this go as far as it can."—Mr. Serjeant Pemberton—"Certainly, my Lord, you will never suffer such a witness as this."—Lord C. J. Wright—"Brother Pemberton, I suppose they can prove it otherwise, or else this is not evidence."

After some other evidence had been given, Mr. Justice Powell observed, "Mr. Solicitor, I think you have not sufficiently proved this paper to be subscribed by my Lords the Bishops."—Mr. Sol. General, "Not to read it, Sir?"—Mr. J. Powell, "No, not to read it; it is too slender a proof for such a case. I grant you, in civil actions a slender proof is sufficient to make out a man's hand, by a letter to a tradesman or a correspondent, or the like; but in criminal cases, (such as this is,) if such a proof be allowed, where is the safety of your life, or any man's life, here?"—Mr. Solicitor General, "We tell you a case where it was allowed, and that is Mr. Sidney's case—a case of treason, and printed by authority. We tell you nothing but what was done the other day."

L. C. J. Wright—"I tell you what I say to it: I think truly there is proof enough to have it read, and I am not ashamed nor afraid to say it, for I know I speak with the law, say what you will of criminal cases and the danger of people's lives; there were more danger to the government, if such proof were not allowed to be good."—M. J. Powell—"I think there is no danger to the government at all, in requiring good proof against offenders."—L. C. J.—"Here's my Lord Archbishop, and the Bishop of St. Asaph, and my Lord of Ely; their hands are proved, it is proved to be my Lord Archbishop's writing by Mr. Brookes; and he proves my Lord of Ely's hand by comparison, and so my Lord

of Asaph's. Now, Brother Pemberton, there's an answer to your objection. It being proved that it is all my Lord Archbishop's hand-writing; then they come and say, 'We'll prove the hands of the others by comparison'; and for that they bring you witnesses, that say, they have received letters from, and seen their hand-writing several times; and comparing what they have seen with this very paper, says the witness, 'I do believe it to be his hand.' Can there be a greater evidence, or a fuller."—Mr. Serjeant Pemberton—"Admit it to be full evidence against my Lord Archbishop; what's that to the rest? There's no evidence against them."—Mr. Justice Allybone—"Brother Pemberton, as to the objection you make of comparing hands, it is an objection indeed, I do agree; but then consider the inconvenience which you and Mr. Pollexfen do so much insist upon. If a man should be accused by a comparison of hands, where is he; he is in a most lamentable case, for his hand may be so counterfeited, that he himself may not be able to distinguish it.—But then you do not consider where you are, on the other side; that may be an objection in matters of fact, that will have very little weight, if compared and set altogether. For, on the other side, where shall the government be, if I will make libels, and traduce the government with prudence and discretion, and all the secrecy imaginable: I'll write my libel by myself prose is as you can. That's a fatal blot to the

government, and therefore the cases are not the same, nor is your doctrine to pass for current here, because every case depends upon its own facts. If I take upon me to swear I know your hand, the inducements are to myself, how I came to know it, so as to swear it. Knowledge depends upon circumstances; I swear that I know you, but yet I may be under a mistake, for I can have my knowledge of you no other way but from the visibility of you. And another man may be so much like you, that there is a possibility of my being mistaken; but certainly that is evidence, good evidence. Now here are several gentlemen that swear as to my Lord Archbishop's hand-writing. I do agree as to some of the others, that the evidence is not so strong for what that man said, that he did believe it was rather such a Lord's hand, than that which went before, or that which came after, it is of no weight at all, and so some of the others, but it is positively proved against my Lord Archbishop. And one or two more, so that that's enough to induce the reading of this writing."

Mr. Justice Holloway—"Good, my Lord, let me give my opinion."—L. C. J.—"With all my heart, brother."—Mr. J. Holloway—"My Lord, I think, as this case is, there ought to be a more strong proof, for certainly the proof ought to be stronger and more certain in criminal matters than in civil matters. In civil matters we do go upon

slight proof, such as the comparison of hands for proving a deed, or a witness's name, and a very small proof will induce us to read it; but in criminal matters we ought to be more strict, and require positive and substantial proof, that is fitting for us to have in such a case, and without better proof I think it ought not to be read."

L. C. Justice—"You must go on to some other proof, Mr. Solicitor, for the court is divided in their opinions about this proof."

The rational observation of Mr. J. Powell, that there is no danger to government in requiring good proof against offenders, affords a pleasing relief to the disgraceful and pernicious doctrine expounded by the Chief Justice and his coadjutor Allybone, which in plain terms was an avowal that in a state prosecution the life and liberty of the subject are of too little importance to be entitled to consideration, and that defendants, therefore, in such cases, ought to be convicted upon evidence, on which, in any other case, they would be acquitted. When a similar distinction was attempted to be made in a subsequent case*, it was observed by Lord Camden, C. J. "As to the distinction which has been aimed at between state offences and others, the Common Law does not understand that kind of reasoning.

The defendant † having committed a riot upon

* Case of seizure of papers, 11 St. Tr. 317.

† R. v. Sir T. Culpepper, Holt, R. 293.

the person of Sir F. W. in his own house, an information was filed against him, and he produced a witness to swear to the contents of a letter from the prosecutor, who deposed it was in the same hand with another letter which had been admitted to be read in evidence. But Holt, C. J. said, "In the case of a deed lost or burnt, we will admit a copy or counterpart, or the contents to be given in evidence; but we never permit it, unless it be proved that there was such a deed executed. Now here the witness cannot prove this letter written for he never had seen the prosecutor write," and therefore it was disallowed.

In Crosby's case*, which was a trial before Holt, C. J. for high treason, several treasonable papers were produced, which the witnesses swore they believed to be in the hand-writing of the prisoner. And on this a question arose, whether comparison of hands was evidence. And the court held, that though it was not sufficient for the original foundation of an attainder, it might be well used as a circumstantial and *confirming evidence*†, if the fact be otherwise fully proved, as in Lord Preston's case, where it was proved that he attempted to go with certain papers into France,

* 12 Mod. 72. Holt, 753. Salk. 689.

† See the cases of Layer, Ld. Preston, Algernon Sidney, St. Tr. Buchanan, Dr. Hensey, 1 Burr. 642, and the trial of O'Connor and others at Maidstone.

and where they were found upon his person; but that, in the principal case, since they were found elsewhere, to convict on a similitude of hands, would be to run into the error of Colonel Sidney's case. Upon this trial, the prisoner produced a copy of the act of parliament for the reversal of Sidney's attainder, in which it is declared that the comparison of hands* is not legal evidence.

A paper was produced, said to be the handwriting of a deceased rector †. In order to prove this fact, the plaintiff's counsel offered to produce many of the returns of the spiritual courts, of the births and burials made in the time of the rector, and signed with his name. Mr. J. Yates said, "I have no doubt to reject this evidence as not admissible; I do not know of any case where comparison of hands has been allowed to be evidence at all."

In Revett v. Braham ‡, to prove that certain written instructions to be a forgery, two clerks of the Post-Office were called, who swore, that they were accustomed to inspect franks and detect forgeries, and they were allowed to swear to their belief that the writing in question was written, not in a natural, but in imitation.

They were then asked, if they could judge whe-

* Lord Ray. 40.

† Brookbard v. Woodley, Peake's C. N. P. 20. See also Micpherson v. Thoytes, ibid.

‡ 4 T. R. 497.

ther the instructions were written by the person who wrote a memorandum, which was produced. This question was objected to, as being a comparison of hands, but allowed by the court. And Lord Kenyon, C. J. mentioned a case where a decypherer had given evidence of the meaning of letters, without explaining the grounds of his art, and where the prisoner was convicted and executed. And Buller, J. said, it was like the case of "Wells harbour," where persons of skill were allowed to give evidence of opinion.

In Cary v. Pitt*, the plaintiff, to prove the defendant's acceptance of a bill of exchange, called an inspector of forgeries at the Post Office to prove that he had frequently seen franks pass the office in the defendant's name, and that, from the character in which those franks were usually written, he believed this acceptance to be the defendant's hand-writing.

Lord Kenyon said, "This is not admissible evidence. The furthest extent to which this rule has been carried, is to admit a person who has been in the habit of holding an epistolary correspondence with the party, to prove the hand-writing from the knowledge he acquired in the course of the correspondence. A case reported in Fitzgibbon was the first in which such evidence was admitted. That evidence was admitted on sound

* 37 G. 3. Appen. to Peake's Law of Ev.

principle; for if, when letters are sent directed to a particular person on particular business, an answer is received in due course, it is a fair presumption that the answer was written by the person whose hand-writing it purports to be; but the franks sent to the office may have been the defendant's hand-writing, or they may have been forgeries as well as the present; for no communication was had on the subject with the defendant. The witness was then asked, whether, having been used to detect forgeries he could say, whether this was a genuine hand-writing or otherwise. Lord Kenyon said, he could not receive this; and observed, that though such evidence was received in Revett v. Braham, he had in his charge to the jury laid no stress upon it.

In Da Costa v. Pym *, the question was, whether an account purporting to be signed by the plaintiff, was a forgery. A witness being asked the usual question as to his belief, said, that the writing produced was *like the plaintiff's*, but that he did not think it was the plaintiff's writing, because he knew him to be a man too well acquainted with the world to sign such an account. Erskine contended that this answer was proper, and that it was like the case which arose on the hand-writing of Mr. Mickle, the translator of the Lusiad. Mr. Caldecot, in that case, was permitted to say, he

* App. to Peake's *Law of Ev.* 37 G. 3.

thought it was not the hand-writing of Mr. Mitchell, because he was a very correct man in making capital and small letters where such were required, but in the writing produced the correctness was not observed. Lord Kenyon said, "That is a very different case from the present. Mr. Culdecot's observations arose from the character of the hand-writing itself; but this witness takes into his consideration facts entirely unconnected with and extrinsic from the hand-writing. The jury may take all circumstances into their consideration, but the witness should form his opinion from the character of the hand-writing only." Several notes, signed by the plaintiff, were then produced to the jury, but Lord Kenyon said, that the best rule was that laid down by Mr. J. Yates; for if the jury were to look at the papers, their judgment would depend upon their knowledge of writing, which some might know better than others. It was best to rely on the evidence of those well acquainted with the plaintiff's hand-writing. The jury nevertheless were permitted to compare the different signatures.

In Stranger v. Searle *, the question was, whether a written acceptance of a bill of exchange was in the defendant's hand-writing. Erskine, for the defendant, offered to produce other bills of exchange accepted by the defendant, and which

* 1 Esp. N. P. C. 14.

were proved to be his hand-writing, for the purpose of comparing them with the bill in question. This was objected to by the plaintiff's counsel, as it did not appear which was the real hand-writing, those bills, or the others upon which the action was brought, both being proved by witnesses, and that it was besides judging from comparison of hands.

Lord Kenyon ruled, that the witness should not be allowed to decide on such comparison of hands. It was then said by the defendant's counsel, that the witness had seen him write his name several times. But being asked as to the circumstances, he said, that previous to the trial the defendant had so written his name for the purpose of shewing to the witness his true manner of writing it, that the witness might be able to distinguish it from the pretended acceptance to the bill in question. His Lordship told him, that he should not permit that to influence his judgment, since the defendant might write differently from the common mode of writing his name, through design. The witness being unable, from mere inspection, to say whether the acceptance was a forgery or not, his testimony was rejected.

In the King v. Cator*, in order to prove the libel, on which the prosecution was founded, to have been written by the defendant, the inspector of franks at the Post-Office was called. He stated,

* 4 Esp. R. 117.

that from his practice, he was enabled to distinguish between natural and feigned hands; and that, by comparing two writings, he thought he could pronounce whether they were written by the same or different persons. On seeing the libel, he swore to his belief that it was written in a disguised hand; but being desired to compare the libel in question with another writing, and to say whether they had been written by the same or different persons, the question was objected to, and after it had been very fully argued.

Hotham, Baron, in delivering his opinion, observed, "I perfectly agree with the counsel for the prosecution, that there is no difference, in point of evidence, whether the case be a criminal or civil case, the same rules must apply to both: at the same time it has been stated, that one is more disposed to resist, and more cautious in receiving evidence, in a case where the party has much at stake, as in favour of life.—What is the evidence here? Two persons have been called, who, having looked at these libels, have spoken, without any doubt, of their being the hand-writing of the party accused. As far as that goes there is no objection to it. Then comes the inspector of franks from the Post-office; he has these libels put into his hands. Now, I do not know how that gentleman could speak to the hand-writing, unless he could say he had seen the party write, or unless

he had been in the habit of correspondence with him, excepting that he is called to speak as a man of science to an abstract question. In that light he has been called, and his evidence has been admitted. He is shewn these papers, and he is asked to look at them; and, without inquiring who wrote them, or for what purpose, he is asked, 'From your knowledge of hand-writing in general, do you believe that writing to be a natural or fictitious hand.' His science, his knowledge, his habit, all entitle him to say, I am confident it is a feigned hand. To that there is no objection, and so far as that goes, I see no reason for rejecting that evidence.

"Then comes the next and important point. It is said to him, 'Now look at this paper, and tell me whether the same hand wrote both?' Why, one cannot help seeing evidently, what must be the consequence; I cannot conceive there is any thing in the idea of a comparison of hands, if this is not to be considered as comparison of hands. The witness says, 'I never saw him write in my life.' Why, then, I collect all my knowledge of his being the author of this, by comparing the same hand with that which other witnesses have proved to be a natural hand: by looking at the two he draws his conclusion. It seems to me, therefore, directly and completely a comparison of hands. This question seems to have been solemnly de-

cided, but when I see the same noble and learned Judge repenting of what he had suffered in the former case, and expressly saying he could not receive such evidence, and observing, that though such evidence was received in Revett and Braham, he had, in his summing up to the jury, laid no stress upon it. This being the case, I cannot consider it so adjudged, but that I may exercise my own judgment in rejecting it."

From these cases it may be collected, that previous to the case of the Seven Bishops, it was the common practice in civil cases to admit evidence by comparison of hands; that is, a witness comparing the writing A. with the writing B. was allowed to swear to his belief that they were both written by the same person.

That such evidence is not admissible in either a criminal or civil proceeding.

That there is now no difference* between civil and criminal proceedings, as to the admissibility of written evidence.

That no person is competent to prove hand-writing, who has not either seen the party write, or has been conversant with his hand-writing from habits of business; in which case, he must give his evidence from the general knowledge of the character which he has acquired. And that even

* 2 T. R. 201. The Attorney-General v. Le Merchant, B. N. P. 236.

where the person whose hand-writing is to be proved, is dead, other writings ascertained to have been his are not allowed to be compared by the jury with the writing in question*.

That a person who is conversant with the detection of forgeries is competent to prove that any given writing is in a disguised hand, or is not the genuine hand-writing of the person to whom it is attributed.

Where a person has seen another write, though but once, the belief founded upon that knowledge is evidence to go to a jury†.

A defendant may be guilty of publishing a libel not only by distributing copies of it with his own hand, but by employing an agent for the purpose‡.

The declaration generally avers, that the defendant published and caused to be published; but the latter words seem perfectly unnecessary either in a civil or criminal proceeding; since, in civil proceedings, the principal is to all purposes identified with the agent employed by him to do any specific act, and in treason and misdemeanors§ all accessories are considered as principals.

The most frequent case in which evidence to

* Where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write, evidence of similitude has been received. B. N. P. 136.

† Garrels v. Alexander, 4 Esp. 37.

‡ 7 East, 65. Bac. Ab. tit. Libel, 458.

§ 1 Hal. P. C. 613.

show a publishing by an agent, is adduced, relates to actions or prosecutions against booksellers, where a libel has been sold by an apprentice or servant, who transacts his master's business. The effect of such evidence appears to have long been perfectly settled by a number of decisions, which shew that a sale by an agent, in the regular course of business, amounts to *primâ facie* proof of a sale and publication by the owner; and that though it be not conclusive as to a guilty knowledge of the contents, yet that it imposes upon him the necessity of rebutting the inference by evidence to the contrary *.

It has been said, "that it is not material whether the person who disperses libels is acquainted with their contents or otherwise, for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher, would make him safe in dispersing them. And that, on this foundation, it has been constantly ruled of late, that the buying of a book or paper containing libellous matter, at a bookseller's shop, is sufficient evidence to charge the master with the publication, though it does not appear that he knew of any such book being there, or what the contents thereof were, and that it will not be presumed that they were brought there by a stranger;

* Bac. Ab. tit. Libel, 458.

but the master, if he suggests any thing of this kind in his excuse, must prove it.*

It is to be recollected, that the only question at present considered is, how the libel and its publication must be connected with the defendant by evidence, to admit the reading of the letter; and it appears perfectly established, that the sale by his servant, in the ordinary course of his employment, is a sufficient preparation for such admission, though undoubtedly it is a mere presumption which the master is competent to cut down, if he can, by opposite proof.

An information† was moved for against the defendant for selling and publishing a libel against the Chambers, and it was insisted upon for the defendant, that her servant took the libel into the shop without her knowledge. But by the court, this is no excuse; for a master shall answer for his servants, and the law presumes him to be acquainted with what his servant does.

And L. C. J. Raymond said, that it had been ruled, that where a master lives out of town, and his trade is carried on by his servant, the master shall be charged with his servant's publishing a libel in his absence.

* See Bac. Ab. tit. Libel, 458. Wood's Inst. 445. 2 Sess. Cass. 33. 12 Vin. Ab. 229. Fitzgib. 47. Haw. P. C. c. 73. s. 10. Barnard, K. B. 308. Plunkett v. Cobbett, 2 East.

† R. v. Dodd, 1724. 2 Sess. Cas. 33. D. LL. 27.

In the case of the King v. Nutt*, the defendant was indicted for being the publisher of a treasonable libel. It was proved that she kept a pamphlet shop, where the libel was sold, no evidence was offered to prove her knowing of its being bought or sold out. The defendant proved that her house, where she lived, was a mile off from the shop, and that she had been bed-ridden there for a long time. The Chief Justice held, that the master of a shop is answerable for whatever books are sold there.

This liability of booksellers was fully discussed in the case of the King v. Almon†. The defendant had been convicted of publishing a libel (one of Junius's letters) in one of the magazines called the London Museum, which was bought at his shop, and professed to be printed for him.

The defendant was found guilty on proof that the libel in question had been sold in his shop. A motion was afterwards made for a new trial on an affidavit, the principal bearing of which was, that the libel had been sent to his shop, and sold there by a boy without his knowledge, privity, or approbation. But the court were of opinion, that none of the matters on behalf of the defendant, nor all of them added together, were reasons for granting a new trial, whatever weight they might have in extenuation of his offence, and in consequence lessening his punishment; for they were extremely

* Barnard, K. B. 306. Fitzgib. 47. Dig. L. L. 27.

† 5 Burr. 2689.

clear and unanimous in opinion, that this libel, being bought in the shop of a common known bookseller and publisher, importing by its title-page to be printed for him, was a sufficient *primâ facie* evidence of its being published by him; not indeed conclusive, because he might have contradicted it, if the facts would have borne it, by contrary evidence.

In the above case Lord Mansfield observed, "A libel cannot be read against a defendant before it has been proved upon him. This must, however, be understood of such *primâ facie* proof of publication as would be sufficient to be left to a jury; for no evidence on the part of the plaintiff or in support of a prosecution, can in strictness amount to proof, since the evidence of any witnesses, is always liable to be rebutted by opposite testimony, and must after all depend for its effect upon the credit given by the jury to the character of the witnesses, and the circumstances under which such evidence is given*."

If one procure another to publish a libel, the procurer is guilty of the publication wherever it shall be made; and the publisher is a competent witness to prove that he was employed to publish the libel, and did in consequence publish it†.

* See the King v. Johnson, 7 East, 65. See also the King v. Dod, 2 Ses. c. 33. Bac. Ab. tit. Libel, 497. Wood's Ins. 445.

† Ibid.

Next, of the evidence to prove a publication in a *particular county or place.*

It seldom is material, in a civil action, to prove the libel to have been published in any particular county; though, in a criminal proceeding, which is in its nature local, the offence must be proved to have been committed within the county in which the indictment has been found. But since, in a civil action, it may become necessary to prove a local publication, it will not be irrelevant to consider in this place the evidence by which such a publication ought to be supported. In general, where a publication has once been sanctioned, the author of it is guilty of such publication in whatever county the libel shall in consequence be published*.

A general confession that the defendant was the writer of a libel, does not amount to a confession that the libel was published at all, even though it should afterwards be found to have been published in a particular county, still less does it admit the publication in such county †.

In the case of the seven Bishops, after the proof which had been offered of comparison of hands had been rejected, the court being divided in opinion, it was proved that the defendants had, with much unwillingness, confessed before the king and coun-

* B. N. P. 6. 7 East, R. v. Johnson.

† Seven Bishops' case, St. Tr. 4 J. 2.

cil at Whitehall, that the signatures subscribed to the petition had been written by them. It was also proved that the petition had come into the king's hands in Middlesex, but by what agency did not appear. The reading of the petition upon this evidence was at first opposed by the defendants' counsel, upon the ground that no act of publication had been proved in Middlesex. It was, however, afterwards consented to, on an understanding that the point should be reserved.

Had the evidence rested here, it seems the Chief Justice would, though against his inclination, have yielded to the force of this objection, even though it appeared upon the face of the petition that the intention of the petitioners was to present it to the king, and it had before been proved to have reached him.

When a libel has been sent by the post, it seems that the defendant is guilty of a publication in any county into which the libel shall be carried*. But the post-mark, however, upon a letter, is not evidence of a publication in the county from which such letter purports, by its post-mark, to have been sent, for it may have been forged†. It seems, however, that in some instances the post-mark may be evidence when corroborated by other circumstances‡.

* ~~R. v. Watson, 1 Comp. 915.~~ 4 St. Tr. 353.

† Ibid.

‡ R. v. Johnson. 7 East, 65.

In the case of the King v. the Hon. Robert Johnson *, the defendant was indicted in the county of Middlesex for having published a libel in Cobbett's Weekly Register. Mr. Cobbett, the publisher of the Register, proved that he had received an anonymous letter (the original of which he believed to be destroyed) in the same hand-writing as the libels which he afterwards received; in which letter (parol evidence of which was admitted to be given for this purpose) the writer inquired whether it would be agreeable to Mr. Cobbett to receive for publication in his Register, certain information of public affairs in Ireland, and if it were, he was desired to say to whom such information was to be directed. In consequence of the receipt of this letter, which was published in the Register, Mr. Cobbett, through the medium of the same Register, requested the promised information to be directed to Mr. Budd, No. 100, Pall Mall, whose shop was at that time used by Mr. Cobbett for the publication of his Register, where letters of communication were addressed to him, and from whence he received them, his own house being in Duke-street, Westminster. After this intimation, Mr. Cobbett received in due time two several letters, containing different parts of the libels in question, both in the same hand-writing with the letter previously received. Both the letters

* 7 East, 65.

came under cover, but the covers were believed either to be destroyed or lost, having been thrown aside as useless; and therefore parol evidence was admitted, to prove that they had the Irish post-mark upon them, and were directed in the manner pointed out in the Register. The first of the letters, dated 29th October, 1803, was received, and the cover opened by Mr. Budd, who thereupon sent it, together with the cover opened, to Mr. Cobbett in Duke-street, by a person in the office whom the witness did not recollect. But in consequence of his desiring Mr. Budd not to open any other letters so directed, Mr. Cobbet received the next letter, which came to Mr. Budd, by a subsequent post, unopened. Several witnesses were then called, who, upon examination of the letters so received by Mr. Cobbet, swore to their belief of their being the hand-writing of the defendant, who, at the period in question, was an Irish Judge. It was then proposed by the attorney-general that the letters containing the libels should be read, which he said contained internal evidence that they were written and sent by the writer to Mr. Cobbet, for the purpose of being published in his Register.

But the reading was objected to, upon the ground that there was no evidence to go to the jury, of a publication *by the defendant* in Middlesex. That, admitting the libels to be in the hand-writing of the defendant, there was no evi-

dence to show that he had sent them into Middlesex to be there published, nor any privity established between himself and Cobbett. The case of the seven Bishops was quoted as in point; and it was contended, that if any publication, proved to have taken place in Middlesex, was sufficient ground for the reading of the libel there, it ought to have been read in that case, since the petition, which had been acknowledged to have been signed by them, was found in the king's hands in Middlesex; and that the only link there wanting was, that it came there by the agency of the Bishops, which was holden not to be supplied by the evidence of their acknowledgment of their hand-writing in that county. The trial was at bar, before Lord Ellenborough, C. J. and Grose, Lawrence, and Le Blanc, Justices.

But it was answered by the court, that the case of the seven Bishops was irrelevant; that it had been soundly ruled in their case, that the confession of their signatures, extorted from them as it was, did not amount to evidence of a publication in Middlesex; that in the present case, a publication in Middlesex had been proved by Mr. Cobbett, and that the notification by letter to him, that he should receive certain papers for the purpose of publication, the public answer in the Register appointing the mode of sending, and the consequent receipt of papers by Cobbett, through that channel, answering the description of those proposed to

be sent, and proved to have been written by the defendant, afforded evidence to go to a jury to decide, whether the publication in Middlesex had not been made through the defendant's procurement.

Besides the general proofs already mentioned, some still remain relating peculiarly to the publishers and proprietors of newspapers. In the case of the King v. Topham*, the defendant was indicted for publishing in a certain newspaper called the World, a libel reflecting on the memory of the late Earl Cowper. To establish the fact of publication, it was proved that the paper in question was sold at the defendant's office; that the defendant, as proprietor of the paper, had given a bond to the Stamp-office pursuant to the 29th G. 3. c. 50. s. 10. for securing the duties on the advertisements; and that he had from time to time applied to the Stamp-office respecting the duties. The jury, on this evidence, found the defendant guilty; and upon a motion for a new trial, this was held by the court to be strong evidence of publication.

By 38 G. 3. c. 88. which is entitled, "An Act for preventing the mischiefs arising from the printing or publishing newspapers and papers of a like nature, by persons not known, and for regulating the printing and publication of such papers in other respects," it is enacted,

* 4 T. R. 126.

By Sect. 1. that no person shall print or publish any newspaper until certain affidavits or affirmations shall have been delivered to the commissioners of stamps or their officers.

By Sect. 2. These must contain a true description of the proprietors, or of two of them, and of their places of abode, of their shares in the paper, and the house wherein it is intended to be printed, and of its title.

By Sect. 5. The affidavit or affirmation (in case the party be a Quaker) must be in writing, signed by the parties, and sworn to or affirmed before the commissioners, or an officer appointed by them.

By Sect. 7. A penalty of £100 is imposed upon such as shall print, publish, vend, or deliver any newspaper, without making such affidavit or affirmation.

By Sect. 9, it is enacted that all such affidavits and affirmations as aforesaid, shall be filed, and kept in such manner as the said commissioners shall direct, and the same, or copies thereof, certified to be true copies as hereinafter is mentioned, shall respectively in all proceedings, civil and criminal, touching any newspaper or other such paper as aforesaid, which shall be mentioned in any such affidavits or affirmations, or touching any publication, matter, or thing contained in any such newspaper or other paper, be received and admitted as conclusive evidence of the truth of all such

matters set forth in such affidavits or affirmations as are hereby required to be therein set forth against every person who shall have signed, sworn, or affirmed such affidavits or affirmations, and shall also be received and admitted in like manner, as sufficient evidence of the truth of all such matters against all and every person who shall not have signed or sworn, or affirmed the same, but who shall be therein mentioned to be a proprietor, printer, or publisher of such newspaper or other paper, unless the contrary shall be satisfactorily proved." The section then contains an exception in favour of such as have, before the publication of the paper in question, delivered in to the commissioners an affidavit, stating that they have ceased to be the printers, &c. of such paper.

By the 10th section, it is enacted, that in some part of every newspaper, &c. shall be printed the names, additions, and places of abode of the printers, &c. and the place where the same is printed, under a penalty of £100.

By Sect. 11, it is further enacted, that it shall not be necessary, after any such affidavit or affirmation, or a certified copy thereof, shall have been produced in evidence as aforesaid against the persons who signed and made such affidavit, or are therein named, according to this act, or any of them, and after a newspaper, or other such paper as aforesaid, shall be produced in evidence, intituled in the same manner as the newspaper, or

other paper mentioned in such affidavit or copy is intituled, and wherein the name or names of the printer and publisher, or printers and publishers, and place of printing, shall be the same as the name or names of the printer and publisher, or printers and publishers, and the place of printing mentioned in such affidavit or affirmation, for the plaintiff, informant, or prosecuter, or person seeking to recover any of the penalties given by this act, to prove that the newspaper or papers to which such trial relates, was purchased at any house, shop, or office, belonging to or occupied by the defendant or defendants, or any of them, or by his or their servants or workmen, or where he or they, by themselves or their servants or workmen, usually carry on the business of printing or publishing such paper, or where the same is usually sold.

By Sect. 13. it is enacted, that a certified copy of such affidavit or affirmation shall be delivered by the commissioners to the person requiring it, upon payment of one shilling.

By Sect. 14. In order to prevent the inconveniences which might result from requiring the personal attendance of the commissioners, it is enacted, that a certificated copy of any affidavit or affirmation, proved to be signed by the officer who has the custody of the original, shall be received in evidence as sufficient proof of such affidavit or affirmation, and that the same was duly sworn

or affirmed, and of the contents thereof; and that such copies, so produced and certified, shall also be received as evidence that the affidavit or affirmation, of which they purport to be copies, have been sworn or affirmed according to this act, and shall have the same effect in evidence as the originals would have had, in case they had been produced and proved to have been duly so certified, sworn and affirmed, by the person appearing by such copy to have sworn or affirmed the same as aforesaid.

By the 17th section it is enacted, that every printer or publisher of every newspaper or other such paper, shall within six days deliver to the commissioners, or their officer, one of the papers so published, signed by the printer or publisher in his handwriting, with his name and place of abode; and that the same shall be kept by the commissioners or their officer, under a penalty, in case of neglect by such printer or publisher, of £100. And that upon application by any person to the commissioners or their officer, to have such paper produced in evidence in any proceeding, whether civil or criminal, such commissioners or officer shall, at the expense of the applicant, at any time within two years from the publication, either cause the same to be produced in the court, and at the time when the same is required to be produced, or shall deliver the same to the applicant, on his giving reasonable security, at his own expense,

for returning the same. And that, in case such commissioners or their officer cannot, by reason of a previous application, comply with the terms of a subsequent one, they shall comply with such subsequent one as soon afterwards as they shall be able so to do.

By the 28th section, it is enacted, that if a bill be filed in any court, for a discovery of the names of any persons concerned in the property of, or as printers, editors, or publishers of, or otherwise in any newspaper or other such paper, or of any matters relating to the printing and publishing, in order to enable the party more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in such newspaper or other paper as aforesaid respecting such party, it shall not be lawful for the defendants to plead or demur to such bill, but they shall be compellable to make the discovery thereby required; provided that such discovery shall not be made use of as evidence or otherwise, in any proceeding against the defendants, save only in that proceeding in which the discovery is made.

Hart and White, the printer and proprietor of a newspaper called "The Independent Whig," were indicted in London for a libel published in that paper.

10 East, 94.

The prosecutor gave in evidence the affidavits sworn by the defendants, with their hands writing thereto, and delivered to the commissioners, containing all the particulars required by the act, and amongst the rest, the description of the place where the newspaper was printed, which was in London. An officer from the Stamp Office, (which is not in London) produced a newspaper, without stating from whence it came, containing the libel in question, which newspaper answered the whole description contained in the affidavit, and stated, at the foot of it, that it was printed at No. 55, Warwick-lane, London; and it was also proved, that the defendant's printing-house was at the same place.

The defendants were found guilty, but a new trial was afterwards moved for, on the ground that the evidence at the trial was insufficient to prove a publication in London; that the 9th clause of the act cited made the affidavit evidence of nothing more than the matters contained therein, which, by reference to the second clause, are the names, additions, descriptions, and places of abode of the printers, publishers, and proprietors, the description of the printing-house, and title of the paper; that it was still necessary to prove a publication in the county where the trial was had, since the paper, though printed in one place, may be published in another; that the 11th section is confined to actions or informations for penalties given

by the act; that the object of the 17th clause was to fix the printing and publication upon the parties described in the Stamp-Office documents, by comparing the newspaper so delivered with any other of the same impression published in the county where the trial is had; but that a publication to the commissioners under the direction of the act could not be considered as a libellous and guilty publication, without any other evidence of publication in the same place; that besides, the newspaper was only produced by an officer from the Stamp-Office, without any proof how it came there, or from whom it was received.

The court were satisfied that the evidence of a publication in London was sufficient*, on the grounds that "the act requiring an affidavit to be made by the printers, proprietors, and publishers, specifying their names and places of abode, &c., makes the affidavit conclusive as to the several facts contained in it, as against the persons signing it, unless they ceased to be printers before the publication complained of. That had the act stopped here, the affidavits would be conclusive that one of the defendants was the printer and publisher, and the other the proprietor of the paper so intituled; and that it was printed at the place therein described, which is within the city of London, that would have put them upon shewing that the paper produced was a fabrication. But the 11th sec-

* Lord Ellenborough, C. J. gave no opinion.

tion goes further, and enacts, that proof of the affidavit shall render it unnecessary to prove that a newspaper corresponding in title. &c. with the one described in the affidavit, and to which the trial relates, was purchased at any house, &c. belonging to or occupied by the defendants, their servants, &c. or where they usually carry on the business of printing or publishing such paper, or where the same is usually sold.

That at all events, the 11th section superseded the necessity of further proof, since the words of it, plaintiff, informer, prosecutor, &c. were general, and not confined to informants seeking to recover penalties.

Where the defendant, having exhibited a libellous paper, retains it in his possession, if, after notice to produce it, he refuse, parol evidence may be given of its contents, and that even in cases of treason*; and a printer may prove that he received a libel in manuscript from the defendant, and returned it to him†.

To prove‡ the publication of a newspaper, an unstamped copy may be given in evidence, and the witness may swear, that similar papers were published.

* See Le Merchant's case, 2 T. R. 201. Layer's case, 6 St. T. 229.

† R. v. Pearce, Peake's Cas. 75.

‡ Ibid.

CHAPTER XXVI.

Of Evidence relating to Special Character, Malice, &c.

WHERE the plaintiff has averred that the scandal affects him in some particular character, he is in general bound to prove that such character belonged to him at the time of the publication.

The character is described in the declaration, either particularly or generally.

In the former case, it is incumbent on the plaintiff to prove such description, with all its circumstances, though a more general proof, under a more general description, might have sufficed; since, though an averment wholly irrelevant may be regarded as surplusage, one which is material must be proved as pleaded.

The defendant * said of the plaintiff, "He is a quack, and if he shews you a diploma, it is a forgery."

The declaration averred that the plaintiff "was a physician, and had regularly taken his degree of Doctor of physic."

In support of this averment, he produced a diploma, purporting, on the face of it, to have been

* Dr. Moises v. Dr. Thornton, 8 T. R. 303.

granted by the University of St. Andrews, in Scotland, and to have the university seal appendant to it. To authenticate this, a witness was offered, to prove that the rector and professors of the university of St. Andrews had acknowledged, in his presence, their signatures subscribed to the diploma. The same witness was ready to prove a certificate, by the master and professors, of the due taking of the degree, and an acknowledgment by the seal-keeper of the university, that the seal appendant to the diploma was the seal of the university. Lord Kenyon, C. J. deeming this evidence insufficient, the plaintiff was nonsuited. A motion for a new trial was afterwards refused, on the ground, that the plaintiff having averred that he had duly taken the degree of doctor of physic, he was bound to prove it; and it was observed by Lawrence, J. "even if it be not necessary in general for the party to shew that he has taken his degree, in this case it is necessary on account of the plaintiff's allegation."

Lord Kenyon, C. J. also observed, that the best evidence to prove the taking of a degree is by the production of the books containing the act of the corporation by which the degree is conferred.

It seems perfectly settled, that the plaintiff may describe his character generally in the declaration, as that he is a physician or attorney. What evidence will satisfy such a description is not so certain.

In the case of Richardson v. Gutch*, the action was brought for calling the plaintiff a quack. The declaration alleged that the plaintiff had used and exercised the profession, &c. of a physician, &c. To prove this, a person, who was a surgeon and apothecary, was called, who would have proved that the plaintiff for several years had prescribed as a physician, and that the witness had acted under him. But Buller, J. was of opinion that the evidence was insufficient, and that it was necessary to produce the plaintiff's diploma, upon which it was produced in court, and the plaintiff recovered.

In the case of Berryman v. Wise†, the plaintiff averred that he was an attorney of the court of King's Bench, and having been employed in a particular cause, had received a certain sum of money, which the defendant charged him with swindling, adding a threat, that he would move the court to have him "struck off the roll of attornies." Upon the trial before Thomson, Baron, at the Worcester assizes, the plaintiff proved the words, and his having been employed as an attorney in that and other causes. It was objected that the plaintiff had not proved the first allegation in his declaration, viz. that he was an attorney of the court of King's Bench, which must only be proved as that he is a physician or attorney. What evidence

* Before Buller, J. Worcester Summer assizes, 1787.

† 4 T. R. 366.

by his admission, or by a copy of the roll of attornies. But the objection was overruled, the learned Judge reserving the point, with liberty to move to enter a nonsuit.

Upon motion made, the court were of opinion, that the evidence was sufficient, for the defendant's threat imported that the plaintiff was an attorney. And Buller, J. said, "In the case of all peace officers, justices of the peace, constables, &c. it is sufficient to prove that they acted in those characters without proving their appointments, and that even in the case of murder. Excise and custom-house officers, indeed, fall under a different consideration; but even in their case evidence was admitted, both in criminal and civil suits, to shew that the party was a reputed officer, prior to the 11th Geo. I. c. 10. s. 12.

In case of actions brought by attornies for their fees, the proof now insisted upon has never been required; neither in actions for tithes is it necessary for the incumbent to prove presentation, institution, and induction; proof that he received the tithes, and acted as incumbent, is sufficient."

But in the last case upon this subject, Smith v. Taylor*, nearly the same question arose as in Pickford v. Gatch; and the point was much discussed both by the counsel and the learned Judges of the Common Pleas, who were ultimately di-

* 1 N. R. 196.

vided in opinion. The declaration stated, that the plaintiff, at the time of speaking the words, was a physician. Upon trial of the cause before Sir J. Mansfield, C. J. it was proved that the plaintiff had practised for some years as a physician in the town of Yarmouth; that Dr. Girdlestone, who was also a physician at Yarmouth, and of longer standing than the plaintiff, had been attending one Richard Helsden as a patient, and that the defendant was employed as his apothecary. That Dr. Girdlestone being obliged to leave Yarmouth for a day, the plaintiff was sent for at the request of Helsden's wife, and prescribed for him; the prescription was made up by the defendant. On Dr. Girdlestone's return, the plaintiff requested that he might be sent for; Dr. G. refused, and the plaintiff then, with reference to the transaction, said, "I and Dr. G. both thought that Helsden was doing well, till Mrs. Helsden called in Dr. Smith, who has upset all we have done, and die he (Helsden) must." Moises v. Thornton was cited on the part of the defendant, to prove it necessary for the plaintiff to shew that he was a *regular physician*. His lordship was of opinion, that the case was irrelevant, and the plaintiff obtained a verdict for £100. This case was afterwards argued on a rule to shew cause why the verdict should not be set aside, and a new trial had; and the learned judges not being agreed, delivered their opinions *seriatim*; Sir J. Mansfield, C. J. and

Mr. Justice Heath, agreeing that the plaintiff was entitled to recover without further proof, and Rooke and Chambre, Justices, conceiving it to be requisite for the plaintiff to prove that he was lawfully authorized to practise. Since the court were equally divided, the plaintiff of course retained his verdict.

In hazarding a few observations on the subject of this legal difficulty, it will be convenient to consider the varieties which special characters admit of, considered with reference to the means by which they are acquired.

1. The character may be acquired by mere user, without the aid of any legal form, for the purpose of clothing the party with that character, as, when he sues as a merchant or mechanic.

2dly. In other cases, where the character is not created by any legal form, the acting in it may be prohibited, unless the party qualify himself in some particular mode; as, where a person exercises a trade mentioned in the statute 5 Eliz. c. 4, in such case he is a tradesman by mere user, but is prohibited under penalties from following it, unless he has qualified himself by serving an apprenticeship for seven years.

3dly. Some legal form may be necessary in order to confer the character in which the plaintiff sues; as, where words are spoken of him as a justice of the peace, or as the incumbent of a particular benefice, where legal forms are necessary

to invest the party with the character in which he assumes to have been injured.

In the first of these, no doubt can arise as to the evidence; a merchant, who complains that his reputation as a merchant has been injured, can give no other proof of his title to the character than that he has traded as such.

In the second class of cases, the character is acquired by user; but the user itself is prohibited, unless certain statutable requisitions have been complied with.

It does not appear in general to have been deemed necessary for a plaintiff, who sued in such a character, to shew that he had complied with every requisite which a penal statute might have prescribed; and since such a rule comprehends a great number of cases much litigated, the absence of objections on the subject is a cogent argument to prove that they were never thought available. If such proof were necessary, the necessity would extend to every action in which a tradesman or mechanic, comprehended within the 5th of Elizabeth, brought an action for words relating to his trade or business, and he would, upon trial, be put to prove that he had served for seven years as an apprentice, since otherwise his exercise of it would be unlawful; and on the same ground every magistrate, or officer under government, would, in a similar case, be bound to prove that he had duly taken the sacrament, or complied with other

forms prescribed by the statutes, the neglect of which would render the acting in such office illegal.

In the case of Smith v. Taylor, where the plaintiff averred himself to be a physician, the point expressly arose. It could not be contended in that case, that the plaintiff was not a physician, since no precise form is by law essential to the constituting a person a physician*; and physicians existed *eo nomine*, and were contemplated by the law as such before the prohibiting statute was passed, which rendered their practising without certain qualifications unlawful. That statute could not, therefore, be considered as creating a new order and description into the profession. The objection then amounted to this, that the plaintiff being what he had by user proved himself to be, "a physician," was bound to proceed, and shew that he had exercised his profession without violating any statute.

Though the case of Berryman v. Wise be not an express and distinct authority to shew, that the legal investment with an office is in no case necessary to be proved, inasmuch as the user in that case was mingled with the admission contained in the defendant's threat; yet it goes far to prove, that where no formal inception of character is required by law, it is unnecessary to prove a com-

* 1 Com. Dig. tit. Physician.

pliance with any statutes prohibiting the acting in that character under particular restrictions.

In that case it was not contended that the plaintiff was obliged to prove that he qualified himself to act in the capacity of an attorney, as directed by the 25th Geo. 3. c. 80.; and yet it appears clear, that if it had been shewn that the plaintiff, at the time the words were spoken, was acting as an attorney unlawfully, and in direct violation of a statute, he could not have recovered. There was the same necessity, therefore, in Berryman and Wise, of proving that a certificate had been taken out by the attorney, as existed in the case of the physician, to prove his compliance with the statute of Henry the Eighth, supposed to prohibit the practising as a physician without a degree or letters testimonial. Neither does the admission in Berryman and Wise at all apply to this point, or in any way operate as supplementary evidence; since, allowing it the most ample effect, it can amount to no more than an acknowledgment that the plaintiff's name had been admitted on the roll of attorneys, which affords no evidence that he afterwards regularly qualified himself by taking out the stamptable certificate.

The plaintiff, in the case of Smith v. Taylor, having proved that he had practised as a physician, since it was not contended, on the other hand, that he would be entitled to recover if the practising was illegal, the question was, upon which party

the burthen of proof should be thrown upon the plaintiff, to shew that he had acted legally, or upon the defendant, to prove that the plaintiff had violated a statute.

The general presumption of the law in favour of innocence speaks powerfully in favour of the plaintiff; but to this it is objected, that the plaintiff, by proving that he has acted in a character requiring the observance of certain legal requisites, has placed himself in the same situation with a defendant against whom an action is brought to recover statutable penalties; in which case, it is incumbent upon him to rebut a presumed liability by proving the qualification. There seems, however, to be a material distinction as to the legal situation of the parties in the two cases: in the one, the plaintiff proceeds to enforce the existing law, by the means which the law directs, and the question of qualification is directly in issue between the parties. In the other, the defendant adopts a mode of proceeding which the law does not warrant, and then attempts to screen himself behind a defect in the plaintiff's title, which does not come directly in issue; he does not contend that his own conduct is pure, but relies on the culpability of his opponent; contending, that on grounds of general policy, the plaintiff is not entitled to damages. The rule of policy certainly prescribes that a person, in the illegal receipt of profits, shall not recover for their diminution, by whatsoever means it may have

been affected, but it seems equally to prohibit a wanton attack upon character at the discretion of an individual, which may produce consequences infinitely more serious than the pecuniary penalty prescribed by the legislature; not that the magnitude of these consequences is material where the illegality has once been substantiated, but the possibility of their far exceeding the legislative measure of punishment, seems to operate in favour of the plaintiff, where the question is, from whom the proof of illegality or innocence shall be expected.

Evidence that the party has acted in a particular capacity, for which he ought to have qualified himself in a manner prescribed, in a proceeding against him grounded on the neglect to qualify, imposes upon him no doubt the necessity of proving his qualification; but the same necessity does not always exist when the party has brought himself by evidence within the predicament; if it did, it would follow that a carpenter, suing in an action for a month's work and labour for the defendant, must go on to prove his having served an apprenticeship; and that a surgeon * in London, in an action for his service, must prove his licence from the college. In such cases, though upon grounds of strict legal policy, the plaintiff may be disabled

* See Gremare v. Le Clerc Bois Valer, 2 Camp. 144. Law v. Hodgson, 2 Camp. 147. 11 East, 180.

to recover where the illegality of his acting is manifest; yet the law will not presume the defect, but require proof of it from the defendant, who obtrudes the objection upon the notice of the court.

The general presumption of the law in favour of a man's having performed his duty is so strong as in some instances to outweigh the rule which calls upon the party to prove the affirmative; and this happens where the party neglecting would have been guilty of a criminal omission. The case of Monke v. Butler *, is very strong to this effect. The plaintiff sued for tithes in the spiritual court; the defendant pleaded that the plaintiff had not read the thirty-nine articles, and the court put the defendant to prove it, though a negative. Whereupon he moved the court for a prohibition, which was denied, since the law will presume that a person has read the articles, for otherwise he is to lose his benefice.

And upon the same principle, upon an information against Lord Halifax †, for refusing to deliver up the rolls of the auditor of the Court of Exchequer, the court put the plaintiff upon proving the negative, viz. that the defendant did not deliver them, for a person shall be presumed duty to execute his office till the contrary appears.

* 1 Roll. Rep. 89.

† B. N. P. 298. Vin. Ab. tit. Evidence.

In the King v. Coombs*, the defendant swore an affirmative, for which an information was exhibited against him, and although a negative could not be proved, the court directed that the prosecutor should first give *probable evidence*, and that the defendant should afterwards prove the affirmative if he could. These cases were cited, and their authority recognized by Lord Ellenborough, C. J. in delivering the opinion of the court in the case of Williams against the East India Company†.

It seems difficult to distinguish the case of Monke v. Butler from that of Smith v. Taylor, as far as relates to evidence of character. In each case, the plaintiff charges the defendant as a wrong doer; in the first, by unlawfully withholding tithes; in the second, by diminishing his professional profits by an officious intermeddling; the nature of the defence is the same, since in each the defendant insists upon the want of a legal qualification in his adversary; and in each the defendant would be guilty of neglect in acting without the qualification so strong, therefore, is the analogy, that it is not easy to conceive upon what grounds the presumption which prevails in favour of the plaintiff in the one case, should not equally operate in the other.

Thirdly, Where the character is derived from some legal and formal investment. In the case of

* Comb. 377. † 3 East. R. 192.

Berryman and Wise, the evidence that the plaintiff had acted as an attorney was mingled with the quasi admission, supplied by the defendant's words, and stress was laid upon that circumstance both by the learned judge who tried the cause and by the court above, by whom his opinion was confirmed; the decision, therefore, cannot be considered as a distinct and express authority, to shew that evidence of *user* alone is in such cases sufficient.

But the dictum of Mr. Justice Buller, subjoined to the opinion of the court, clearly evinces his opinion, that evidence of the plaintiff's having practised as an attorney would alone have been sufficient; since, without adverting to the circumstance of admission, he places the evidence on the same footing with that allowed in the case of a constable, in which it had solemnly been decided, that his having acted in the office was sufficient proof that he was a constable, even in an indictment for murder.

The general mode of pleading in an action against a wrong doer for a disturbance, supplies an argument applicable to this case. In a possessory action, where the plaintiff complains that he has been hindered in the enjoyment of any right, it seems to be in no case necessary to allege any legal title to that in which he is disturbed; so that in an action against the defendant for a disturbance in his right to take toll, or to enjoy an exclu-

* Ch. 109.

sive right of ferry, it is sufficient for the plaintiff to aver his possession, or that "*habere debet*," without setting out his title; the plain reason for allowing which is, that the plaintiff is to recover damages only, and the right or title to the land does not come in question.

And so, in the action for slandering a plaintiff in his profession or office, which bears a strong analogy to an action on the case for a disturbance, it is sufficient to aver that the plaintiff* used *and exercised the profession*, or generally, that he held the office; whence it should seem, that proof of such possession, as against a disturber, without legal authority, would be sufficient evidence to satisfy the allegation.

Next as to evidence of malice.

The different presumptions of law in cases of slander, as already observed, are, first, conclusive in favour of the defendant; secondly, in favour of the defendant, but liable to be rebutted by evidence of express malice; or thirdly, against the defendant, but liable to be controverted by any evidence proving his intention to have been pure. In the second class, where the burthen of proving express malice is thrown upon the plaintiff, he may, in support of the allegation, give in evidence any expressions of the defendant, whether oral or written, indicating spite and ill-will towards

* 2 T. R. 305. Pickford v. Gatch.

him, for the purpose of shewing the temper and disposition with which he made the communication complained of. And since the object of such evidence is to enable the jury to ascertain whether the defendant acted from good or evil motives, it is not material whether the instances of the defendant's ill-will, are or are not immediately connected with the publication in question; but a judge will, in such a case, instruct the jury to confine themselves, in their assessment of damages, to the words stated in the declaration. It was once doubted whether, in admitting evidence of this nature, a distinction ought not to be made between words not actionable in themselves and those which are so. In the case of Mead v. Daubigny *, Lord Kenyon rejected evidence of words actionable in themselves, and not mentioned in the declaration; but his Lordship afterwards changed his opinion, and admitted such evidence in a subsequent case †.

In Russel v. Macquister ‡, evidence of actionable words spoken after the time of those laid in the declaration, was objected to, on the ground that if such words were taken into consideration, by the jury, the defendant might be made to pay a double compensation for the same injury, since

* Peake's Case, 125.

† Lee v. Huson, Peake's Cases, 166. R. v. Pearce, Ib. 75.

‡ 1 Camp. 49.

another action might be brought for the words last spoken, and the distinction was taken between that case and the case of words not actionable. But Lord Ellenborough, C. J. overruled the objection, observing, that though such a distinction had once prevailed, it was not founded in principle; and that, although no evidence can be given of any special damage not laid in the declaration, yet that any words, or any act of the defendant, is admissible, to shew *quo animo* he spoke the words which are the subject of the action.

Upon the same principle*, where a libel was contained in a political paper published weekly by the defendant, after proof that the paper in question had been purchased at the defendant's office, evidence was admitted of the previous sale of other papers with the same title at the same office. And the reason of admitting it was, to shew that the papers, which purported to be weekly publications of public transactions, were sold deliberately, and vended in the regular course of circulation; that the paper containing the libel was not published by mistake, but vended publicly, deliberately, and in regular transmission for public perusal.

In case of actions brought by former servants against masters for giving false characters, it has

* Plunkett v. Cobbett, 5 Esp. 136.

already been seen that it is incumbent on the plaintiff to adduce extrinsic proof of malice.

In such instances the plaintiff, if charged with dishonesty and misconduct in the defendant's service, is at liberty to prove his good character and conduct in former services, since general character is in some respects in issue; and it seems that wherever the words impute crime or dishonesty, evidence of previous good conduct is admissible*. So the plaintiff may prove by the evidence of other servants in the same family, that whilst he remained in the defendant's service, he conducted himself well, and that no complaints of the nature ascribed to him by the defendant then existed†. And the tendency and bearing of this evidence is to shew, that the defendant knew that the character he gave was false. It has been said, that a servant, in order to recover, must prove the character to have been *maliciously* ‡ as well as *falsely* given. By this is to be understood, that in addition to that presumption of law, as to the plaintiff's innocence of the charge, arising from the defendant's declining to justify, he must go further, and shew that the character was given out of spite and ill-will; and the plain reason for this is, that the knowledge of misconduct frequently

* King v. Waring and Uxor, 5 Esp. 13.

† 3 B. & P. 589.

‡ Weatherstone v. Hawkins, 1 T. R. 110.

rests with the defendant himself; and being unable to prove it by the testimony of others, if the general presumption were to operate against him, he would be left without defence. To prevent such inconvenience, the law does not permit the presumption of falsity so to operate, but requires malice to be proved from other sources. In case, however, the plaintiff should be able expressly to prove that the defendant was aware of the falsity, no further proof of malice would be requisite; nor, indeed, could a stronger proof of it be produced than that the defendant had given a character of the plaintiff injurious to his reputation, with a full knowledge that it was untrue.

The circumstances under which the master and servant parted, any expressions of ill-will uttered by the former, his officiously acquainting others with the servant's misconduct, without any previous application to him for a character*, are all facts proper to be left to a jury to give their opinion upon* the question of intention.

In the third class of cases, where the presumption of law is against the defendant, no evidence of malice is of course expected from the plaintiff; and any overt act of publication imposes the burthen of explanation upon the defendant, since it will be presumed that the party knew the contents of that which he published. Thus it has been seen,

* 3 B. & P. 587.

that a bookseller is, in the first instance, presumed to know the contents of any book sold at his shop; and upon proof of the sale, the contents are so far considered to have been fixed upon him, that the plaintiff is entitled to have them read in evidence against him; so far has this species of presumption been carried, that it has been held, that under an indictment for sending a threatening letter*, the bare delivery of it, though sealed, was of itself *primâ facie* evidence of a guilty knowledge of the contents.

So, in case a servant deliver a letter containing a libel, by his master's directions, the mere proof of delivery, though sealed, would in the first instance entitle the plaintiff in an action against the servant, to have the contents read; and if the servant, in his defence, shewed that he received the letter sealed from his master, the plaintiff might reply to such evidence, by shewing that the servant was actually aware of the contents; since, though a servant is in duty bound to execute the commands of his master which appear lawful, he is not protected in the execution of those which he knows to be illegal.

In general, no evidence can be given of any damage not stated in the declaration †; and any damage which is stated must be proved to have resulted from the wrongful act of the plaintiff, as

* The King v. Girdwood, Leach. Cas. C. L. 169.

† See Russel v. Macquister, 1 Camp. 48.

averred in the pleadings. It has been said, that the plaintiff, in an action for a malicious prosecution, may give in evidence the circumstances of the defendant, in order to increase the damages. The principle, however, upon which such evidence is allowable, is not very obvious, and scarcely can be warranted, unless the situation and rank of the defendant have affected the quantum of prejudice sustained by the plaintiff.

CHAPTER XXVII.

Evidence for the Defendant.

IT has already been seen of what circumstances the defendant may avail himself, to shew that his conduct was not attributable to malice, under the general issue* or by pleading.

Where the words are capable of being explained by reference to circumstances, such proof is incumbent on the defendant †.

In the case of Penfold v. Westcote ‡, it was proved that the defendant said of the plaintiff, "Why don't you come out, you blackguard, rascal, scoundrel Penfold, you are a thief." The witness, who proved the words, was not asked whether, by the word "thief," he understood that the defendant meant to charge the plaintiff with felony.

Chambre, J. in his direction to the jury, said that it lay on the defendant to shew that felony was not imputed by the word "thief." And after a verdict for the plaintiff, a new trial was refused.

But where it plainly appears from the context,

* See Chap. 23.

† Cro. J. 114. B. N. P. 5.

‡ 8 N. R. 335.

that the word was not used in a felonious sense, the plaintiff will be nonsuited upon his own shewing*. In general, it seems that where the publication of a libel † has been fixed upon the defendant, it rests with him to establish the innocence of his intention ‡.

It may next be considered of what evidence the defendant may avail himself for the purpose of mitigating the damages.

In Mullett v. Hulton §, the declaration stated that the plaintiff was about to take a house, but that the defendant, in order to prevent him, addressed a letter to the owner, containing the following passage: "Mr. Hulton cannot for a moment suppose that Mr. Salter is acquainted with the newspaper particulars relative to the party alluded to (the plaintiff), otherwise it is not probable that Mr. Salter would introduce an acknowledged felon, debauchee, and seducer, into the neighbourhood of Angel Row."

Erskine, for the defendant, contended that he was at liberty to go into evidence that the plaintiff had been, in fact, a seducer, not as an answer to the action, but in mitigation of damages. He admitted, that not having pleaded the truth of the

* 1 Camp. 48.

† R. v. Topham, 4 T. R. R. v. Withers, 3 T. R. 428. R. v. Woodfall, Burr. R. v. Almon, Burr. 2686.

‡ See Girdwood's case, Leach. C. C. L. 169.

§ 4 Esp. 248.

words, he could not prevent a verdict from passing against the defendant; but that he, having referred to newspaper authority for the words used in the letter, and not having given them as his own, or from his own knowledge, that he should be at liberty to give the fact in evidence as coming from another source, to which he referred in his letter, and as the slander did not proceed from him, it would go in mitigation of damages.

Lord Ellenborough, C. J. said, that as the pleadings stood on the record, the evidence offered was inadmissible as an answer to the action. The libel itself was proved, and there was no justification that entitled the defendant to a verdict; but he added, that as the words referred to a newspaper, and were so written as a quotation from a newspaper, if the newspaper could be produced, he would admit it as evidence, as having caused the defendant to adopt what he had written in the letter, he having so referred to it.

Where the defendant has not pleaded the truth in justification, it does not appear perfectly settled how far he is at liberty to proceed in evidence *tending* to prove the truth of the matter published.

An action was brought* for a libel published in the Morning Post, charging the plaintiff with having been concerned with a person of the name of

* Knobell v. Fuller and another, sittings after T. T. 1797.

Knowles in procuring money from the relatives and friends of persons convicted of capital offences, under pretence of being able to procure pardons through the interference of the Duke of Portland, in whose service the plaintiff was.

The defendant pleaded the general issue, and in mitigation of damages offered evidence to prove strong grounds of suspicion against the plaintiff. Eyre, C. J. at first doubted whether this evidence was admissible.

Adair, Serj. for the defendant, admitted that the defendant could not give in evidence on the general issue, facts which, if pleaded, would amount to a justification; but contended that they might prove facts which shewed there was cause of suspicion, and therefore proved that the defendants were not induced to publish this paper by reason of malice against the plaintiff, but for the purpose of conveying information to the public, this being a concern of a public nature. A note of the case of Curry v. Walter was then read, in which his Lordship admitted the distinction, and received such evidence.

Eyre, C. J. said, he believed in that case he admitted the evidence in order to shew that the defendant had not in fact published a libel, he having only published the proceedings of a court of justice, which the court afterwards determined to be no libel in point of law; but he would not deny but he might also have received it in miti-

gation of damages: for though he had never known the evidence given in an action for a libel, yet he had always understood that in an action for words the defendant might, in mitigation of damages, give any evidence short of such as would be a complete defence to the action, had a justification been pleaded.

The defendant then called Mr. Ford, a magistrate, to prove, that on the examination of the plaintiff before him, he *admitted* that he had received five guineas for conveying a letter to the Duke; and the Duke himself being examined, said, that thinking the plaintiff had misconducted himself in that respect, he had discharged him from his service.

An action was brought for a libel* published in the Morning Herald, imputing to the plaintiff the offence for which Lord Audley suffered in the reign of Charles I. The declaration contained the usual exculpatory averments, and stated that the plaintiff had lost the society of many worthy subjects in consequence of the publication. The defendant pleaded not guilty.

Upon the trial before Sir J. Mansfield, C. J. evidence was offered in mitigation of damages, that at the time of the publication, the plaintiff was generally suspected to have been guilty of the charge imputed, and that in consequence of this

* Earl of Leicester v. Walter, 2 C. N. P. 251.

general suspicion his acquaintance had deserted him.

This evidence was objected to. It was contended that it would be in vain to bring an action if such evidence were permitted. That a plaintiff could not come prepared to defend every act of his life. That there was nothing on the record to put the character in issue; and that to admit such evidence would only be giving the defendant an opportunity of continuing and aggravating the original libel.

Sir J. Mansfield, C. J. admitted the evidence, observing, that he could never answer to his own satisfaction, the arguments used for the plaintiff. That since it had been held that any thing short of proving the evidence imputed in the libel was evidence in mitigation, he did not know how to reject the witnesses. Besides that, the declaration stated that the plaintiff had always preserved a good character in society, from which he had been driven by the insinuations in the libel. That the question for the jury was, whether the plaintiff had actually suffered this grievance or not, and therefore that evidence to shew that his character was in as bad a situation before as after the libel, must be admitted.

The learned Judge, in summing up, directed the jury to consider, in assessing the damages, whether the reports which had been proved were sufficient to shew that the plaintiff could receive

little injury; and that, in this point of view, it did not matter whether the reports were well or ill founded, provided they got into many men's mouths.

Though the admissibility of such evidence does not seem to have been yet decided upon argument, yet the opinions of the eminent persons who have deemed such to be admissible at Nisi Prius, lease no doubt upon the question, especially considering that the last learned Judge, before whom the point arose, conceived himself bound to the admission, not only by the averments upon the record, but also by the antecedent decisions on the subject. Some difficulty, however, may be found in reconciling the rule laid down in its fullest extent, namely, that any *matters short of actual proof are admissible in mitigation*, with the resolution of the Judges in Underwood v. Parks*. The evidence offered in the cases cited, is either general evidence of the plaintiff's suspicious character previous to the publication, or of particular facts *tending* to shew his actual guilt. In the former case, the reason of admitting the evidence appears plain and obvious, and it seems to be immaterial whether the plaintiff avers his previous good character, and the desertion by his acquaintance or not, since the law will presume that he has a good one till the contrary be proved, and will equally presume a loss

* Stra. 1200.

after proof of actionable words; but it is impossible to say that the defendant has not a right to give general evidence that the plaintiff did not sustain any loss of character in consequence of his publication, but that, on the contrary, his character had previously been ruined, since the loss of character is the very basis of damages, and notice to this effect by a special plea would render no assistance to the plaintiff in providing counter-evidence, since all he could do would be to prove by general testimony that his reputation was previously good, which, as already observed, the law presumes for him, and which he would not be able to prove by any particular facts.

But particular facts, which might form part of a chain of circumstantial evidence against the plaintiff, in case he were indicted for the offence imputed, seem to fall under a different consideration. First, because any fact of such a nature is evidence rather to rebut malice than to affect the quantum of damages; since, though malice be essential to the action, it is not the criterion and measure of damage; and though circumstances inducing a belief of the plaintiff's guilt in the mind of the defendant, take away considerably from the malignity of his intention; yet, since they do not amount to a justification, there is still a residuum of malice sufficient to support the action. And secondly, if one circumstance be admitted, tending to fix actual criminality upon the plaintiff, a

second and third could not, in principle, be rejected; and it would, in many instances, be difficult for a judge to confine the evidence within such limits, that it should not produce on the minds of the jury a conviction of the plaintiff's guilt, or, in other words, to avoid infringing upon the general rule laid down by all the judges*.

Where extrinsic assertions are given in evidence by the plaintiff, to shew the defendant's malice, the the latter is at liberty to prove the truth of such assertions under the general issue, since he had no opportunity of pleading the matter specially†.

A member of parliament may be called upon to state‡ whether another member took part in a particular discussion, but cannot be examined as to what was said in the course of the debate.

In Curry v. Walter||, a barrister was subpœnaed, to prove that he had made a motion in the court of King's Bench for a criminal information against the plaintiff, for publishing which the latter brought his action. Upon the trial, Eyre, C. J. was of opinion that it was improper to call a barrister as a witness to prove such a circumstance, but that the party ought to prove it by other means; that it was at the option of the counsel to give or withhold his testimony.

* In Underwood v. Parkes, Str. 1200.
† B. N. P. 10. ‡ 5 Esp. R. 136. || 1 Esp. 456.

CHAPTER XXVIII.

Proceedings after Verdict.

WHERE the situation in which the defendant was acting at the time of speaking the words, or publishing the libel, was such as to rebut the implication of malice, and no express malice was proved, the court, it seems, will, after a verdict for the plaintiff, grant a new trial; and this, even though the defendant knew that what he said was not strictly true, provided the variation from the truth be immaterial to the interest stated to have been affected*. But where the false assertion of the defendant is material, no new trial will be granted, though the defendant had an interest in the subject matter affected †.

Where the damages are so outrageous as to induce a strong presumption of partiality in the jury, a new trial will be granted in an action for slander, as well as in other cases, though in such an action the amount of the loss sustained from the injurious act depends upon circumstances of all others the most appropriate for the calculation and assessment of a jury.

* 4 Burr. 2422.

† See Smith v. Spooner, p. 236.

In the case of Lord Townsend v. Dr. Hughes *, which was an action for scandalum magnatum, the words were, "He is an unworthy man, and acts against law and reason." The jury found a verdict for the plaintiff with £4000 damages. A new trial was moved for on these grounds:

1. Because the witnesses who proved the words were not persons of credit, and that, at the time when they were alleged to be spoken, many clergymen were in company with the defendant, and heard no such words spoken.

2dly, Because one of the jury confessed that they gave such great damages to the plaintiff, not that he was damnified so much, but that he might have the greater opportunity to shew himself noble in the resisting of them.

3dly, (Which was the principal reason,) because they were excessive.

North, C. J. and Wyndham and Scroggs, Justices, were of opinion, that no new trial ought to be granted; that in a civil action, where the words themselves are actionable, without an averment of special damage, the jury ought to take into consideration the whole of the damage which the party might sustain, since he could not bring a fresh action; that it was impossible for the court to tell what value to set upon the honour of the plaintiff; that the jury were, by law, judges of the

* 2 Mod. 150.

damages; and that it would be very inconvenient to examine upon what account they gave their verdict.

Atkins, J. dissented from his brethren, conceiving that the court ought to compare the words with the damages, and to consider whether they bore any proportion. He also cited the case of Gouldston v. Wood, where the plaintiff, in an action on the case for calling him a bankrupt, recovered £1500 damages; and the court granted a new trial, because the damages were excessive.

In the same case it was said by Scroggs, J. that had the jury given but one penny damages, the plaintiff could not have obtained a new trial in hopes to increase them.

When the plaintiff's title to recover does not appear perfect upon the face of the record, the defendant may make his objection, either by moving in arrest of judgment within the usual time, or by bringing a writ of error.

It has already been seen what are the rules to be observed in the construction of the defendant's expressions; that they are to be taken according to their plain and obvious meaning, and in the sense in which the hearers or readers understood them.

After a verdict for the plaintiff, by which the defendant's act, meaning, and intention, have been ascertained to correspond with the statement upon the record, the courts will not listen to trivial exceptions, but require the party objecting to point

but the substantial objection upon the face of the proceedings.

And, in general, where words may be taken in a double sense, the court, after a verdict, will always construe them in that sense which may support the verdict*.

Where there are several counts in a declaration, and entire damages are given, if one count be defective, judgment must be arrested for the whole, since it is impossible for the court to apportion the damages, and to say what abatement ought to be made in respect of the vicious count†.

And the same rule holds in case one count in the declaration contain words averred to have been spoken at different times. As if at one time the defendant call the plaintiff "traitor," and at another time "arrant knave and cozener‡," and the plaintiff alleges§ the words to have been spoken at different times, as several causes of action, if the jury assess the damages generally, judgment will be arrested.

But if actionable words are averred to have been spoken at the same time with others not actionable

* See the opinions of Lord Ellenborough, Mr. J. Lechmere, Lord Mansfield, L. C. J. Parker, Lord Holt, C. J. Pratt, Mr. J. Buller, and C. J. De Grey, as cited above, p. 64, &c.

† 8 Mod. 240.

‡ Holt v. Scholefield, 6 T. R. 694.

§ Cro. Eliz. 329. Cro. Car. 236, 237, 338. 3 Wils. 85.

able, the latter are considered as laid merely in aggravation. In case the declaration consist of several counts, in one of which the words are not actionable, and no special damage be averred, or supposing it to be averred, the finding of the jury as to the special damage be for the defendant, and as to the rest generally for the plaintiff, the judgment would be erroneous, and might be avoided by motion, or reversed by writ of error †.

Where, therefore, there is any doubt as to the validity of any one count ‡, it is a matter of prudence to have the damages assessed severally, or to take a verdict upon the other counts only. In § Rich v. Holt, the words laid down as spoken of the plaintiff at one time were, "You are a paltry lawyer, *and use to play on both hands*;" at another, "He is a furtherer and maintainer of felonies." The defendant as to all the words, except those in italics, pleaded not guilty, and as to those a justification. The plaintiff replied, *de injuriâ propriâ*, &c. The jury, upon the first issue, found the whole of the words, and assessed damages for the whole; they likewise found the second issue for the plaintiff, assessing separate damages. The court, on motion in arrest of judgment, decided, that the

* 3 Wils. 188. Lloyd v. Morris, Willes Rep. 443. Roll. Ab. 576. Moor, 142. 708. Cro. Eliz. 328. 789. 1 Rols. 87.

† See the cases, 2 Will. Saund. 171. d.

‡ Bennet v. Wells, 12 Mod. 420.

§ Cro. J. 267.

words, "You are a paltry lawyer," were not actionable, but held that the plaintiff was entitled to judgment on the first issue. It should seem, however, that the plaintiff was not entitled to judgment under the first assessment, supposing the decision to have been correct, that the words "You are a paltry lawyer" were not actionable.

For the words to be considered under the first issue of not guilty were the two sets, "You are a paltry lawyer," and "He is a furtherer and maintainer of felonies," the words in italics not coming under the consideration of the jury, since they were confessed; the damages under the first assessment were, therefore, partly given for the words, "You are a paltry lawyer," which were held not actionable.

It is said to be the practice in the Court of Common Pleas, to award a *venire de novo* where judgment is arrested in such case, upon payment of costs, in order that the plaintiff may sever his damages*. But in the case of Holt v. Scholefield†, in the King's Bench, a *venire de novo* was refused.

In the case of Beevor v. Hides‡, Bathurst, Justice, expressed an opinion, that where the words in one count were not actionable, yet that the postea might be amended, and a verdict as to those words

* 2 Will. Saund. 171. d. Barnes, 478, 480.

† 6 T. R. 61. Sed vid. Eddowes v. Hopkins, Doug.

‡ 2 Wils. 300.

entered for the defendant, upon the Judge's certifying that no evidence was given of them at the trial.

But Lord Camboden said it would be very dangerous, after a verdict of twelve men recorded by the Court, to refer to the Judge's notes in order to alter it, and he thought there was no precedent of such a case, and that the verdict could not be varied.

The general practice however is, where general damages have been given, and it appears that the plaintiff is entitled to recover upon one count, though not upon others, either to amend the postea, which is done where it clearly appears that no evidence was given on the defective counts, or by awarding a *v. f. de novo*, where such evidence has been given, in order that the plaintiff may ascertain to what damages he is intitled for so much of his cause of complaint as will support damages. It does not distinctly appear, upon what principle actions for slander form an exception to the general rule.

CHAPTER XXIX.

Of Costs.

BY the 21 Jac. 1. c. 16. it is enacted, that "in all actions upon the case for slanderous words, to be sued or prosecuted in any of the courts of record at Westminster, or in any court whatsoever, that hath power to hold plea of the same; if the jury, upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same; any law, statute, or usage, to the contrary notwithstanding."

This statute has been held not to extend to actions of scandalum, nor to those where the special damage is the gist of the action, as in case of slander of title*, nor to actions for libel†.

But where the words are in themselves actiona-

* 2 Bl. 1062. 2 Ld. Raym. 1588. Prac. Reg. 111. Cro. Car. 140. Jon. 196. 2 Ld. Ray. 831. 1 Salk. 206. 7 Mod. 129. Willes, 438. Barnes, 132. 2 H. B. 531. 3 Burr. 1688. Barnes, 142.

† Hall v. Warner, T. 24 G. 3. Tidd, 861.

ble, the case is within the statute, though special damage be averred; for the plaintiff is at all events entitled to a verdict for the actionable words, without proving the special damage; and if he were in such case entitled to costs, where the damages were under 40 shillings, the statute might in all cases be evaded by a suggestion of special damage. This construction is, however, not free from inconvenience, since where special damage has actually accrued, the circumstance of the words being in themselves actionable, may operate to the plaintiff's disadvantage, and he may be placed in a worse situation, by that very presumption of law which was intended for his advantage.

And where it clearly appears, as by a special verdict and separate assessment, that the special damage was actually considered by the jury, it seems reasonable that the plaintiff should have full costs, though the damages do not reach the statutable limit*.

Where the words are actionable, and other matter likewise actionable is stated as a distinct injury, and not as a mere consequence of the words, the plaintiff is entitled to full costs; as where the declaration, after stating the words imputing felony, averred that the defendant procured the plaintiff to be imprisoned†.

* 1 Vent. 93. 1 Mod. 31. 2 Keb. 589.

† Str. 645. Ld. Ray. 1598. Cro. Car. 163. Cro. Car. 307.

Where there are different counts in the same declaration, some containing words not actionable, and others containing actionable ones, and special damage be laid referring to all the counts, then the plaintiff will, under a general verdict, be entitled to full costs. For some part of the sum assessed must have been given in respect of the consequential damage*.

The statute extends to damages found under a writ of inquiry†.

The 22d and 23d C. 2. c. 9. is very general in its terms, which comprehend "all personal actions." By this statute it is enacted, that in such actions, wherein the judge at the trial of the cause shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the declaration was chiefly in question; the plaintiff, in case the jury shall find the damages to be under the value of 40 shillings, shall not recover more costs than damages. At first it seems, that the statute was held to extend to all personal actions‡; but it appears now settled, that it is confined to actions of assault and battery, and for local trespasses, wherein it may be possible for the Judge

* 2 H. B. 531.

† 2 Str. 934.

‡ 2 Keb. 849. 3 Keb. 121. 247.

to certify, that the freehold of title to the land was chiefly in question*.

This statute, therefore, does not affect the present class of actions, unless indeed some cases may be imagined, where the title to land may by possibility come in question; as if the plaintiff should declare against the defendant for having slandered his title, and the defendant plead a special justification, averring himself to be entitled to the freehold.

And since the case of slander is not considered within the latter statute, a justification does not entitle the plaintiff to full costs, where the damages are below 40 shillings†.

* See Tidd's Prac. (4 Edn.) 861, where the authorities on the subject are collected.

† Halford v. Smith, 4 East, 567. Barnes, 128. 2 Wils. 150.

CHAPTER XXX.

Of the Writ of Prohibition.

A PROHIBITION to the Ecclesiastical Court is grounded either upon a defect in their jurisdiction, or upon some irregularity in the course of their proceedings.

"The power of these courts, in cases of defamation, was expressly recognised by 13 E. 1. st. 4. "In cause of defamation, it hath been granted already, that it shall be tried in a Spiritual Court, when *money is not demanded*, but a thing done for punishment of sin; in which case the spiritual Judge shall have power to take knowledge, notwithstanding the king's prohibition."

Whence it appears that these courts, before the passing of the statute, had the same jurisdiction; and also that the extent of the jurisdiction was to deal out punishments *pro salute animæ**, and not to award any temporal compensation in the way of damages for loss of character†. And the latter position appears still more clearly from the st of

* 2 Inst. 492. † Ib.

Articuli Cleri*; which enacts that, "In defamations, prelates shall *correct*, the king's prohibition notwithstanding; first enjoining a penance corporal, which, if the offender will redeem, the prelate may freely receive the money, though the king's prohibition be shewed."

Under these statutes it has been held, that no suit is maintainable in the Ecclesiastical Courts for any slander† not of spiritual cognizance. So that an imputation of perjury is not a ground for proceeding in the Spiritual Court.

In the instance cited, the party has his remedy by action at Common Law; but provided the slanderer do not impute any offence cognizable by the Spiritual Court, no punishment can be inflicted for it by such court, though the slander should not be a ground of action at Common Law‡. Thus a suit was instituted in the Spiritual Court for calling the plaintiff a false knave, and a prohibition was granted. And it was said§, that though these words do not imply any offence, of which the temporal law takes cognizance, yet being also not of spiritual cognizance, the Temporal Courts will grant

* 9 Edw. 2. c. 4.

† 2 Burn. Ecc. L. 120. Ld. Ray. 312. 327. Gad. 537. 2 Salk. 698. 11 Mod. 112.

‡ 2 Ins. 493.

§ Ibid.

a prohibition that the Ecclesiastical Courts* may not exceed their jurisdiction.

And the same rule holds though the words be spoken of an ecclesiastical person. The words spoken of a parson were, "He† has no sense; he is a dunce or blockhead, and deserves to have his gown stripped over his ears." It was held that the defendant was not punishable in the Spiritual Court; for a parson is not punishable in that court for being a knave or a blockhead more than any other man; and it was said, that if the parson should be deprived for want of learning, he must bring his action at Common Law.

So it has been held, that to call a dean "a knave," was not suable in the Spiritual Court.

But where words § spoken of a parson impute that which, if true, would subject him to censure in the Ecclesiastical Court, he is entitled to sue there.

Where words of spiritual cognizance are coupled with terms of abuse, which are not in themselves actionable in the temporal courts, no prohibition will be granted‖; so that no prohibition lies in a suit

* 2 Ins. 695.

† Coxter v. Parsons, Salk. 694.

‡ Holt. R. 593. Nelson v. Hawkins, dean of Chichester.

§ Clark v. Price, 11 Mod. 208.

‖ 2 Salk. 692.

for the words, "He is a cuckoldly knave;" and the rule is the same though it should be suggested that the words were spoken through heat and passion†.

Where the words themselves are of mere spiritual cognizance, but special damage ensues, for which an action is brought in a temporal court, it seems no prohibition is grantable.

In the case of Evans v. Brown‡, where the words were of mere spiritual cognizance, a prohibition was moved for upon a suggestion that the plaintiff below had brought an action at law for the words, grounded upon special damage sustained by reason of the defendant's speaking them. It was contended, that this was like the case where one calls a woman whore and thief: in that case she shall not have an action in the Ecclesiastical Court for the words, though she might for the word whore; because it being joined with the word thief, an action lies at Common Law for the words. That in such case the words could not be split, and an action brought at Law for the word thief, and a suit in the Ecclesiastical Court for the word whore; so that here, though the words are properly suable for in the Ecclesiastical Court, yet a special damage attending the speaking of them, by which means an so-

* Gobbett's case, Cro. Car. 339. Golds. 172.

† Ld. Ray. 1136.

‡ Ld. Ray. 1101.

tion lies at Common Law for the words, they shall not proceed for the speaking in the Ecclesiastical Court. But the court refused to grant a prohibition.

But it seems that in general the Spiritual Courts have not, in case of defamation, any concurrent jurisdiction with the courts of Common Law; so that if the same words impute a spiritual and temporal offence, the jurisdiction of the former court ceases. Hollingshead prayed a prohibition to stay a suit in the Spiritual Court for defamation. The words were, "Thou art a bawd, and I will prove thee a bawd;" and because these words were properly determinable in the Spiritual Court, and no action lies for them at Common Law, the prohibition was denied. But* it was held, that for saying, "Thou keepest a house of bawdry," this being matter determinable at the Common Law by indictment, suit shall not lie in the Spiritual Court.

If a man who has lands by descent sue in the Spiritual Court for words of bastardy, a prohibition lies; for the words tend to the temporal† disinheritance of the plaintiff.

But it seems that the mother would, in such case, be entitled to sue in the Spiritual Court, for the imputation upon her own chastity contained in such

* Cro. Car. 229. Str. 1100. Cro. Car. 329.

† 2 Roll. Ab. 292. Qu. et vid. cap. 4.

a charge of bastardy; since, with respect to herself, the slander is of mere spiritual cognizance; and even where the mother and son jointly preferred their libel for such words, a prohibition was denied*.

There seems to be a stronger reason why a man should not sue for words of bastardy than the one assigned in Rolle, namely, that he is not punishable for being a bastard.

Where the same words imputed incontinency, and an infection with the venereal disease to the plaintiff, who sued in the Spiritual Court, a prohibition was granted†: although the first words were of ecclesiastical cognizance.

So where words of‡ incontinency were imputed at the same time with others of felony, a prohibition was moved for and granted for the whole.

If part of the words be actionable, it seems a prohibition will be granted for the whole, though the others charge a spiritual offence. As where the defendant said, "You are a whore and thief‖."

Where words are of temporal cognizance from the custom of a particular place, a prohibition will be granted. As where words of incontinence are imputed to a woman in London, no suit is maintain-

* Lord Ray. 1287. 11 Mod. 117.
† Ld. Ray. 446.
‡ Legate v. Wright, H. 10. G. 2.
‖ 2 Rol. 297. 1 Sid. 404. 3 Mod. 74.

[illegible] Court.* It appear, however, upon suggestion supported by affidavit, or upon the face of the libel itself, that the parties did not live within the scope of the local jurisdiction, the prohibition will be allowed.

Thus, in the case of W. Johnson v. Bewick†, the words were, "Thou art a whore," and the cause of London was suggested; but it appeared on the face of the suggestion that neither of the parties lived within the jurisdiction of London. It was urged, that it would be hard to deprive the defendant of the power of punishing the plaintiff, for having spoken these malicious and defamatory words in a court where she may proceed, to drive her to another court where she cannot proceed, the plaintiff living out of the jurisdiction of the court. And of that opinion was the whole court; and Holt, C. J. said, that if in such case a prohibition were granted, it would give license to all the market women, when they were in London, to defame their neighbours, without fear of punishment.

It seems, that where a prohibition is prayed, grounded upon a supposed want of jurisdiction in the Spiritual Court, the defect if not apparent upon the face of the proceedings, must be verified by affidavit‡.

* Ld. Ray. 711. Str. 187.

† Ld. Ray. 711.

‡ M. 12. G. 2. Hinds v. Thompson. Divers v. Duber. Hill. 12. G. 2. And. 304.

In the case of [illegible] v. [illegible], a prohibition was moved for on the ground of a defect of jurisdiction appearing on the face of the libel, where it was stated that the words, which were of incontinency, had been spoken in London. But the court said that they could not judicially take notice of the custom, without an affidavit. But in the case of Power v. Shaw†, a rule to shew cause was granted why prohibition should not go for calling a woman strumpet, in Bristol, though there was no affidavit of the custom.

It seems generally, that any words from which the intention to impute whoredom can be collected, will be a good ground for prohibition.

The Spiritual Court is bound to allow the defendant the advantage of any justification which would have availed him at Common Law‖.

The plaintiff proceeded in the Spiritual Court for the words, "You had a bastard§." The defendant pleaded that the plaintiff had been sentenced for this cause of having a bastard, and ordered to keep the bastard, at the sessions, at Norwich. Notwithstanding this the court proceeded, and the defendant in the Spiritual Court, moved for a prohibition, suggesting the special matter, to which the other party demurred. It was adjudged that the prohi-

† 1 Wils. 64.
‡ Str. 471.
‖ Com. dig. tit. Prohibition, G. 14.
§ Cro. J. 625. 2 Rol. Rep. 82.

bition should stand: for, being sentenced to be the reputed father by the Justices of the Peace, which is by the authority of the Statute Law, that sentence could not be impeached in the Spiritual Court, or elsewhere; and all are concluded to say the contrary until it be reversed.

By the 1st Edw. 3. st. 2. c. 11. No suit shall be made in the Spiritual Court against indictors. The Commons do grievously complain, that when divers persons, as well clerks as lay people, have been indicted before sheriffs in their turns, and after the inquest procured be delivered before the Justices; after their deliverance they do sue in the Spiritual Court against such indictors, surmising against them that they have defamed them, to the great damage of the indictors, wherefore many people of the shire be in fear to indict such offenders; the king will that in such case every man that feeleth himself aggrieved thereby, shall have a prohibition framed in the Chancery upon his case.

Though the statute in terms comprehends indictments before sheriffs in their turns only, it seems that it extends to indictments in all other courts, and to all witnesses and others who have affairs in temporal courts.

By 27 G. 3. c. 44. No suit for defamatory words shall be brought in any of the Ecclesiastical Courts, unless the same shall be commenced within six

[illegible] from the time when such words shall have been uttered.

The distinction as to the time of moving in prohibition is, that where the defect alleged is extrinsic of the libel itself, the party must apply before sentence in the Spiritual Court; for when the Spiritual Court has an original jurisdiction which is to be taken away upon account of some matter arising in the suit there, after sentence the party shall never have a prohibition, because he himself hath acquiesced in their manner of trial, which is a waiver of the benefit of a Common Law trial. But if the defect of jurisdiction appear upon the libel, the party never comes too late.*

In the early part of the reign of Queen Anne, a prohibition was moved for to stay a proceeding in the court of the Earl Marshal against the defendant, for having said to the plaintiff, who was a knight, "You a knight! † you are a pitiful fellow, and an inconsiderable fellow," to the great scandal of gentlemen and of the order of knighthood. From the judgment given by Lord Holt upon this occasion, it appears that a prohibition had been sent to a Court of Honour some years before, (though it had then been contended that (under 13 Rich. 2. c. 2.) the proper mode of resisting any encroachment by such courts was by a writ from the Privy

* Argyle v. Hunt, Str. 187.

† Chambers v. Jennings, 7 Mod. 125.

Council to restrain them;) since in all cases of encroachments by courts of inferior jurisdiction, the proper remedy is by writ of prohibition.

With respect to the court itself, to which the prohibition prayed for was to be sent, it appeared that it had been held before the Constable and Marshal till the 13th year of H. 8. when the Constable* was attainted of treason, and the office extinguished; but that the pleas relating to matters of law had since been held before the Earl Marshal only. But the court were of opinion, that whatever colour there might be to hold plea of some things before the Marshal alone, there was no pretence to hold plea† of words.

* Stafford, Duke of Buckingham.

† Several instances of great oppression, where this court held plea of words, are cited in Hume and Ld. Clarendon.

CHAPTER XXXI.

Of the Public Wrong.

THE civil injury and the means of obtaining a remedy having been thus inquired into, the subject will next be considered in its relation to the interests of the public.

An offence against the public peace, may consist either in an actual breach of the peace, or in doing that which tends to provoke or incite others to break it. Within the latter description are contained all attempts to produce disorder by means of written, printed, or even oral communications, made for the purpose of generally weakening those religious and moral restraints, without the aid of which, mere legislative prohibitions would prove ineffectual; or for the more open and direct purpose of alienating the minds of the people from the constitution under which they live—of rendering them dissatisfied with its administration, and thereby inciting them to acts of sedition and rebellion; or lastly, for the purpose of encouraging or provoking particular individuals to commit some breach of the peace or other illegal act.

In considering this offence, whose outline has been thus imperfectly sketched, a distribution analogous to that which has been observed in the

preceding part of this treatise naturally presents itself; and it will be inquired,

1st. What circumstances constitute the offence.

2dly. The means of prevention or punishment appointed by law.

1st. What circumstances constitute the offence?

The offence consists in the offender's wilful attempt to produce mischief to the public by means of oral or written communications having such a tendency. The consideration of this branch of the subject, therefore, relates,

1st. To the question—When has a written, oral, or other communication a tendency to produce a breach of the peace.

2dly. To the wilful design or malice of the offender.

3dly. To the overt act by which the attempt is made.

1st. When has a written, oral, or other communication a tendency to produce a breach of the peace?

The intrinsic essence of the offence may consist in the tendency of the communication to weaken religious or moral restraints,—to disgust men with the civil constitution of the state, or the administration of its affairs,—to produce some public inconvenience or calamity,—or to incite individuals to the commission of some illegal act.

It is the close connection between moral obligation and opinions on religious and theological topics, which as it were invests the Temporal

Courts with jurisdiction over the latter, which are apparently of mere spiritual concern. The importance of this relation is strongly illustrated in the instance of judicial oaths. The foundation of these is a belief in a superintending Deity, who watches over the affairs of men, and who will, in a future state, administer rewards and punishments with reference to their conduct here. To remove therefore so solemn and weighty an obligation, would be to overthrow, or at least to weaken, that confidence in human veracity so necessary for the purposes of society, without which no question of property could be decided, and no criminal brought to justice*.

Upon the dangerous temporal consequences likely to proceed from the removal of religious and moral restraints, the punishment for blasphemous, profane, and immoral† publications is founded without any view to the spiritual correction or amendment‡ of the offender.

Blasphemy against the Almighty by denying his being or providence, contumelious reflections upon the life and character of Jesus Christ, and in

* Utiles esse opiniones has quis negat cum intelligat quam multa firmentur jurejurando; quantæ salutis sint fœderum religiones; quam multos divini supplicii metus a scelere revocarit; quemque sanctaverit tectus civium interiisse. Dii immortales! interpositis tam judicibus tam testibus. Cic. de L. L.

† 11 Mod. 142.

‡ 4 Bl. Comm. 59. Fitz. 65. 2 Roll. Ab. 78.

merely to shew that the miracles of Jesus were not to be taken in a literal but in an allegorical sense, and therefore that the book could not be considered as aimed at Christianity in general, but merely as attacking one proof of the divine mission. But the court said they were of opinion, that the attacking Christianity in this way was destroying the very foundation of it; and that though there were professions in the book that the design of it was to establish Christianity upon a true bottom, by considering these narratives in scripture as emblematical and prophetical, yet that these professions could not be credited, and that the rule is, *allegatio contra factum non est admittenda.*

But the Court, in declaring that they would not suffer it to be debated whether writing against Christianity in general was a temporal offence, desired that it might be noticed that they laid their stress upon the term *general*, and did not intend to include disputes between learned men upon particular controverted points; and Lord Raymond, C. J. in delivering the opinion of the court said, "I would have it taken notice of, that we do not meddle with any differences in opinion, and that we interfere only* where the very root of Christianity is struck at."

An information† was filed by the Attorney-Ge-

* Fitzgibbon, 66.

† Hill. Term, 29 G. 2. 1756. Dig. L. L. 83.

[illegible] against Jacob Rive for publishing a profane and blasphemous libel, tending to vilify and subvert the Christian religion, and to blaspheme our Saviour Jesus Christ, and to cause his divinity to be denied, and to represent him as an impostor, and to ridicule, ridicule, and bring into contempt, his holy life and doctrine; and also to cause the truth of the Christian religion to be disbelieved and totally rejected by representing the same as spurious and chimerical, and a piece of forgery and priestcraft.

An information† was exhibited by the Attorney-General‡ against Peter Annett, for publishing a profane and blasphemous libel, intitled "The free inquirer," tending to blaspheme Almighty God, to ridicule and discredit the holy scriptures, and particularly the Pentateuch, representing the prophet Moses as an impostor, and the truths and miracles set forth and recorded in the Pentateuch, as imposture and false inventions.

An information§ was exhibited by the Attorney-General‖ against John Wilkes, for publishing an obscene and impious libel, tending to vitiate and corrupt the minds and manners of his majesty's

* Charles Pratt, Esq. afterwards Chief Justice of the Common Pleas.

† Hil. 2 Geo. 3.

‡ Charles Yorke, Esq.

§ Hil. 4. G. 3.

‖ Sir Fletcher Norton.

subjects, in language and contempt of religion, modesty, and virtue, to blaspheme and insult God, and to ridicule our Saviour and the Christian religion.

In the King v. Williams*, the defendant was convicted of having published a libel, intitled "Paine's Age of Reason," which denied the divinity of the Old and New Testaments, asserting that reason was the only rule by which the conduct of men ought to be guided, and ridiculed the prophets, Jesus Christ, his disciples, and the Scriptures. Upon being brought up to receive sentence, Mr. Justice Ashhurst observed, that such libels were an offence not only against God, but against law and government, from their direct tendency to dissolve all the bonds and obligations of civil society; and that upon this ground it was that the Christian religion constituted part of the law of the land.

Daniel Isaac Eaton was convicted upon an information filed by the Attorney-General†, of having published an impious libel, representing Jesus Christ as an impostor—the Christian religion as a fable—and those who believed in it as infidels to God. Upon being brought‡ up to receive the judg-

* Before Lord Kenyon, C. J. at the Guildhall, 1797.

† Sir Vicary Gibbs, Knt. now a Justice of the Common Pleas.

‡ Easter, 52 G. 3.

[illegible] the court, though his counsel addressed the court for the purpose of mitigating the punishment, no question was taken as to the legality or propriety of the conviction.

It appears, therefore, to have been duly and perfectly settled, that blasphemously cursing the Deity in general, or reviling the Christian religion individually, for the purpose of exposing it to scorn, to contempt and ridicule, is indictable and punishable as a temporal offence at Common Law.

With respect to the extent of this offence and the nature and necessity of the proof, it appears, in the first place, immaterial whether the publication is made and written, though the concealing mischievous matter to print or writing, and thereby affording a wider distribution, would undoubtedly be considered as an aggravation, and affect the measure of punishment.

It does not, in principle, seem material, whether the blasphemy is made upon religion in general or upon some particular proof or evidence in support of it: thus, in Woolston's case, the publication was considered illegal, though the immediate and professed object of the writer was to overthrow the evidence of the divine mission, supplied by the miracles, and to degrade them into mere emblems and allegory. The court were then of opinion, that a *general and*

* The King v. Atwood, Cro. J. 421. The King v. Taylor, 3 Keb. Rep. 607. Vent. 293.

deliberate intention to subvert Christianity, might be *evidenced* by an attempt to weaken one of the several proofs upon which its credibility rests; indeed it would be inconsistent to inflict penalties for any general attack upon the system of Christianity, and yet to allow its foundation to be gradually sapped and undermined with impunity.

It may be asked, is every publication which tends to weaken any particular argument which has been adduced to prove the existence of a superintending Deity, or of the truth of Christianity, illegal and indictable? The principles of law and actual decisions seem to afford this answer, that the *malicious* publication of any thing which tends to weaken man's belief in an omnipotent Providence, or to subvert Christianity, is indictable; but that the publication must be maliciously designed for that end and purpose. In the case cited, the defendants were charged with having exposed Christianity, and its doctrines, to contempt

[illegible]

"See the trial of the publisher of Paine's Age of Reason. The learned counsel for the prosecution (Mr. Erskine) observed, "Every man has a right to investigate, with reason, the fundamental points of the Christian religion; but no man, consistently with a law which only exists under its sanctions, has a right to deny its very existence, and to pour forth such shocking and insulting invectives as the lowest establishments in the gradations of civil authority ought not to be subjected to, and which would soon be borne down by violence and disobedience if they were."

and malice, for the purpose of introducing a general disregard of religion. And in Woolston's case the court desired it might be particularly noticed, that they laid stress upon the term *general*, and did not intend to include disputes between learned men upon controverted points. Both the language of the indictments, therefore, and the guarded expression of the court in the above case, show that it was never a crime, in the contemplation of the law, seriously and conscientiously to discuss theological and religious topics, though in the course of such discussions doubts may have been both created and expressed on doctrinal points, and the force of a particular piece of scriptural evidence casually weakened.

This position is further warranted and confirmed by a circumstance notorious to all literary men, that not only particular and subordinate matters of belief have been canvassed and discussed by the learned, but that even the authenticity of particular miracles has been questioned, and the authority of most important texts disputed; yet these discussions have never been considered as libellous, though frequently tending to weaken particular evidences, and persons of a different religious persuasion, as Jews, though in supporting their own doctrines they must necessarily deny the authority

* 2 Str. 834.

of other religious systems, have never been punished as libellers at Common Law for so doing*.

With respect to the degree of force and intensity necessary to render such a tendency criminal, it is evident that no limitation can be made. The law cannot measure the degree of tendency to produce disorder which an impious libel carries with it; and were it otherwise, any limitation would be absurd, and the law could not tolerate mischief because it did not amount to a certain degree or limit.

Upon the whole, it may not be going too far to infer from these principles and decisions, that no author or preacher who fairly and conscientiously promulgates the opinions with whose truth he is impressed, for the benefit of others, is, for so doing, amenable as a criminal: that a malicious and mischievous intention is in such case the broad boundary between right and wrong; and that if it can be collected from the offensive† levity with which so serious a subject is treated, or from other circumstances, that the act of the party was malicious

* Enactments, 3 Wil.

† Sir William Blackstone, in his Comment upon the Statutes cited below, observes, "It is clear that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate." 4 Bl. Com. 51.

then since the law has no means of distinguishing between different degrees of evil tendency, if the matter published contain any such tendency, the publisher becomes amenable to justice.

The quantity of mischief likely to flow from a given publication cannot be taken into consideration in defining the offence; arguments, levelled against religion or moral obligation, may be trite, or their force despicable, still minds may be found, upon which the vilest sophistry may produce an evil effect; and the weakest mind, as well as the weakest person, has a claim to the protection of the law; if the poison can operate, the *malicious* distribution of it ought to be and is forbidden.

The legislature has nevertheless deemed it proper to fortify the Common Law restraint by several penal enactments applicable to particular persons and cases. By statutes 1 Ed. 6. c. 1. and 1 Eliz. c. 1. s. 14. whoever reviles the sacrament of the Lord's supper shall be punished by fine and imprisonment.

By stat. 1 Eliz. c. 2. if any *minister* shall speak any thing in derogation of the book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life the second; and if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second, he shall be deprived and suffer one year's imprisonment; and for the third, shall in like manner be deprived, and suffer

imprisonment for life. And if any person whatsoever shall, in plays, songs, or other open words, speak any thing in derogation, depraving or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be read in its stead, he shall forfeit for the first offence 100 marks, for the second 400, and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life.

By the 13 Eliz. c. 12. a person ecclesiastical, advisedly affirming any doctrine contrary to the articles established at a convocation, holden at London in the year 1562, is liable to deprivation, if he persist in his error.

By the 3 J. 1. c. 21. whoever shall use the name of the Holy Trinity profanely or jestingly in any stage play, interlude, or show, shall be liable to a penalty of £10.

By 1 Will. 3. c. 18. s. 17. whoever shall deny, in his preaching or writing, the doctrine of the Trinity, shall lose all benefit of the Toleration Act.

By stat. 9 and 10 Will. 3. c. 32. if any person educated in, or having made profession of the Christian religion, shall by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the holy scriptures to be of divine authority, he shall, upon the first offence, be rendered incapable to hold any office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, le-

gatee, or purchaser of lands, and shall suffer three years imprisonment without bail; but if the delinquent shall, within four months after the first conviction, publicly renounce his error in open court, he is discharged for that once from all disabilities.

A person offending under this statute is still indictable at Common Law, since a statute inflicting a new punishment does not take away the old one, unless it change the offence*, or make it of a different nature.

* 2 Str. 834. Barnard. K. B. 162. R. v. Williams, 1797. R. v. Eaton, 1812.

CHAPTER XXXII.

Of Publications tending to subvert Morality.

IT is now fully established, that any immodest and immoral publication, tending to corrupt the mind, and to destroy the love of decency, morality, and good order, is punishable in the temporal Courts, though some doubt, as will appear from a brief review of the cases, seems formerly to have been entertained upon this subject.

Sir Charles Sedley* was indicted for having exposed his naked body in a balcony in Covent Garden, and for having committed other indecent acts before a great multitude of people. The indictment was openly read to him in court; and afterwards, on being required to take his trial at bar, he submitted to it. From the different reports of this case it appears, that after the abolition of the Star-chamber, the Court of King's Bench was considered as the custos morum, to whom the cognizance of such offences most properly belonged; and although it was afterwards contended, that judgment was given against the defendant, on ac-

* Keb. R. 720. 2 Str. 791. Foster, 99. Mich. 15 C. 2.

count of the personal violence he used in throwing down bottles upon the mob, yet from the language of the reporters it clearly appears, that the Judges considered the offence to have been committed against modesty and good manners, and found it necessary to interfere in those profligate times* to punish such immodest practices, which the Court said were as frequent, as if not only Christianity but morality also had been neglected.

Hill† was indicted for publishing some obscene poems of Lord Rochester tending to the corruption of youth, but going abroad he was outlawed.

Read‡ was indicted for publishing a lascivious and obscene libel, and was tried and convicted before Ld. Holt, C.J. It was moved in arrest of judgment, that the offence was merely of spiritual and not of temporal cognizance; Ld Holt was of opinion, that the offence ought to be punished in the Ecclesiastical Court, and that the temporal Courts could not interfere, since there was no precedent for it§; and Powell J. regretted that it was not punishable at Common Law, since it certainly

* During this licentious reign, it appears to have been of little use to convict offenders of this description; for though there were many prosecutions against the players for immodest plays, they had interest enough to get the proceedings stayed before judgment. Frem. Ent. 209. 213, 214, 215.

† Str. 790. Dig. L. L. 60. Mich. 10 W. 3.

‡ Easter, 6 Ann. Fost. Rep. 98, 99.

§ Sir C. Sedley's case seems to be a precedent in principle.

tended to the corruption of manners. And it does not appear, that any judgment was ever pronounced against the defendant*.

The Attorney-general exhibited an information against Curl, for printing and publishing an obscene book, intituled, "Venus in the Cloister, or the Nun in her Smock." The defendant having been found guilty, it was moved in arrest of judgment, that the offence was of mere spiritual cognizance, that in the reign of Charles II. there was a run of obscene writings, for which no prosecutions were instituted in the temporal courts, and Read's case was cited.

It was answered by the Attorney-general †, that to destroy morality is to destroy the peace of government, since government is no more than public order; that the Spiritual Courts punish only spiritual defamation *by words*, but that if it be reduced to writing, it is a temporal offence punishable as a libel.

The Judges had some difficulty at first in giving judgment against the defendant, chiefly on account of Read's case; but afterwards they gave it as their unanimous opinion, that this was a temporal offence. They said, it was plain, that the force used in Sir C. Sedley's case was but a small ingredient in the judgment of the Court, who fined him

* 8 Str. 792. † Sir Philip Yorke.

£2000. And that if the force was all they went upon, there was no occasion to talk of the Court's being custos morum of the King's subjects; that if Read's case were to be adjudged, they should rule it otherwise; and, therefore, gave judgment for the King.

An information* was granted against John Wilkes, for printing and publishing an obscene and impious libel, entitled an "An Essay on Woman." Upon which he was convicted, and sentenced to pay a fine of £500, to be imprisoned for twelve months, and to find security for his good behaviour for seven years.

Since the decision in Curl's case, it seems to have been settled, that any publication tending to corrupt the morals, is punishable by indictment; and a great number of convictions have since taken place, for publishing and vending immodest books and pictures.

With respect to the extent of the offence and mode of publication.

Although many vicious and immoral acts are not indictable, yet if they tend to the destruction of morality in general, if they do or may affect the mass of society, they become offences† of a public nature. In the cases referred to, with the exception of Sir C. Sedley's, the defendants were in-

* 4 Burr. 2527. † Sid. 168.

dicted for printed libels; the principle, however, of those cases, and the express decision in Sir C. Sedley's, seem to comprehend oral communications when made before a large assembly, such as the performance of an obscene play, which offence, it seems, has formed the ground of many prosecutions*. In this case, as well as in that of blasphemous and irreligious publications, any TENDENCY to produce immorality is sufficient; since, for the reasons before assigned, the intensity and degree of that tendency cannot constitute the boundary between guilt and innocence, and, therefore, cannot form a subject for legal inquiry†.

* Str. 790.

† i. e. not before a jury.

CHAPTER XXXIII.

Publications against the Constitution, &c.

PUBLICATIONS tending to excite popular tumult, sedition, or rebellion, by engendering distrust or dissatisfaction in the minds of the subject, relate to alleged defects in, or misrepresentation of the constitution and form of government; or to the personal imperfections, inabilities, and mismanagement of those who are entrusted with its administration: and reflections upon the latter affect them either in their conduct in office, or as individuals.

In the first of these cases, since the opinions communicated are entirely abstracted from all personal allusion, they do not very frequently become the object of legal inquiry; they are too speculative, for the most part, to generate popular heat, unless they come into close contact with personal rights or privileges.

By the 13th of Eliz. c. 1. it is a misdemeanor, and punishable with forfeiture of goods and chattles, for any person to hold, affirm, or maintain, that the Common Laws of the realm, not altered by parliament, ought not to direct the right of the crown of England.

By the 5th Ann, c. 7. s. 7. it is made high treason to affirm by writing, or printing, that the king

is not the lawful and rightful king of the realm, or that any other person has title to the same otherwise than according to the Bill of Rights, the Act of Settlement, and the Act of Union, or that Parliament has not authority to limit the descent of the crown.

One of the earliest cases in which an opinion is given upon the indictable quality of words abstractedly reflecting upon the constitution, appears to have been given in the forty-first year of Elizabeth; where it was adjudged, that no indictment lay for saying that the laws of the realm were not the laws of God; because true it is they are not the laws of God; but that it would be otherwise to say that the laws of the realm are contrary to the laws* of God.

In the 15th† year of Ch. 2. Brewster was a second time convicted for printing and publishing a libel, called "The Phœnix; or the solemn League and Covenant," in which it was declared, that a king abusing his power, may be opposed,—that if he attempt to enforce his encroachments by arms, he may be resisted, because he has violated the contract and covenant made between himself and the people, and that the breaking this covenant was a greater sin than breaking a commandment.

The defendant‡ was convicted on an information

* 2 Rol. Ab. 78.

† Hill. 15 Ch. 2d. K. B. Dig. L. L. 72.

‡ R. v. Harrison, 3 Keb. 641. Ventr. 224. Dig. L. L. 66.

charging him with having published concerning the government of England, and the traitors who adjudged King Charles I. to death; that the government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion. It was moved in arrest of judgment, that there can be no rebellion against the king, but it must be against the three estates, who are all united in the king. But the court overruled the objection, since by 13 C. 2. c. 1. it is expressed, that neither one nor both Houses of Parliament can make war against the king, under any pretence whatever; and that though there be three estates as to making laws, there is but one authority as to war.

And the court supposing that the words tended to set on foot the position upon which the war, levied in 1641 by the two houses against the king, was grounded, were much displeased that counsel would undertake to defend them.

The king had judgment, and the defendant brought error in Parliament.

So a treatise upon hereditary right has been held to be a libel, though containing no reflection upon the existing government*.

Tutchin was convicted† for publishing, in a paper called the Observator, that there were misma-

* The Queen v. Bedford, 2 Str. 789.

† 2 Ld. Ray. 1061. Salk. 51. 6 Mod. 268.

nagements in the government; that for such they had a right to call their governors to account, to displace the ministers, dethrone the reigning sovereign, and to transfer their allegiance to whom they pleased.

Dr. Browne* was convicted for writing a libel, entitled "Mercurius Politicus," which asserted, that "the late revolution was the destruction of the laws of England."

Richard Nutt† was convicted, upon an information, for publishing a libel, entitled "The London Evening Post," in which it was suggested, that the revolution was an unjust and unconstitutional proceeding; and the limitation established by the act of settlement was represented as illegal; and that the revolution and settlement of the crown, as by law established, had been attended with fatal and pernicious conseqences to the subjects of this kingdom.

In the prosecutions of Shebbeare‡, upon an information for a libel, and of Thomas Paine§, on an information for a similar offence, one ingredient, though mixed up with many others, was an attack upon the justice and policy of the revolution, representing it as the origin and foundation of many political evils and calamities.

Such are the principal cases of prosecutions for

* 11 Mod. 86. † Dig. L. L. 68. 27 G. 2.
‡ Hil. 31 Geo. 2. Dig. L. L. 69. § 32 Geo. 3.

libel where the matter has been speculative; not directly pointed at either particular men or measures.

Speculative remarks upon the constitution cannot be reduced to any determined scale, by which their intrinsic legality, that is their tendency, can be ascertained: they admit of every variety, from the mere useful and honest hint and recommendation to the legislature, to remedy a detected abuse or defect, or to introduce into the system of government some new rule or principle which may benefit the community, to the daring and treasonable assertion, that the family on the throne were illegally placed there.

The intrinsic essence of a libel consists in its tendency to do mischief: the question, therefore, as far as concerns its libellous quality is, whether from its terms it is calculated to alienate the mind of the person who reads it from the government under which he lives, and to inflame him to acts of violence and sedition; or merely to instil those wholesome and salutary principles which may be applied to public advantage, and soberly and rationally to point out those partial defects under some of which the most perfect system of government must labour; not for the purpose of exciting unthinking men to seek a violent remedy, in attempting which the political constitution may perish altogether, but for the more wise and benevolent design of pointing out to those who have

political power; how it may best be exerted for the benefit of the state*.

A publication affecting government, may assert either the personal imperfections, or the mismanagement of those who are entrusted with the administration of the existing constitution, and may affect them in their public character, or as individuals; these will be considered, first as they relate personally to the king and his title.

Words† spoken, have frequently been deemed overt acts of treason for which the speakers have suffered. Two persons were executed for unguarded expressions in the reign of Edward IV. the one a citizen, who said he would make his son heir to the Crown (alluding to the sign of the house in which he lived)—the other, a gentleman, whose favourite buck the king killed in hunting, whereupon the owner wished it horns and all in the belly of him who had counselled the king to kill it, and the king being his own counsellor on the occasion, the words were construed into a treasonable expression against the king himself.

* Lord Loughborough, in the debate upon the Libel Bill, observed, "Every man may publish, at his discretion, his opinions concerning forms and systems of government; if they be wise and enlightening, the world will gain by them—if they be weak and absurd, they will be laughed at and forgotten—if they be *bona fide*, they cannot be criminal however erroneous."

† Hale's Pl. Cro. C. 115. See also Hugh Pine's case, Cro. Car. 117. where other capital convictions for speaking words in that reign are cited.

But in less arbitrary times, the legality of such proceedings has been much questioned; and if the position that words may constitute an overt act of treason may not be considered as totally exploded, the rigour of the doctrine has at all events been greatly mitigated. It has been most humanely observed*, that words may be spoken in heat, without any intention; or be mistaken, perverted, or misremembered by the hearer; their meaning depends always on their connection with other words and things; they may signify differently, even according to the tone of voice with which they are delivered; and sometimes silence is more expressive than any discourse. Since, therefore, there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason. Of this opinion were Stamford, Ld. Coke, Ld. Hale†, Sir Michael Foster‡, and Sir William Blackstone§, whose opinion has just been cited; and in the reign of Charles the first, some very atrocious words having been spoken concerning the king by one Pine, all the Judges certified, that "Though the words‖ were as wicked as they might be, yet that they

* 4 Black. Comm. 79.

† 1 Hale, 111. 323.

‡ Fost. Cr. L. 200.

§ 4 Bl. Com. 80.

‖ Cro. Car. 125. See Haw. Pl. Cr. c. 17. s. 32, 33, 34, 35, &c. Fost. Cr. L. 200. 1 Hale, 111. 323.

were no treason; for unless it be by some particular statute, no words will be treason."

It seems clear* however, that words joined to an act may explain it, and that words of persuasion to kill the king, or manifesting an agreement, or consultation, or direction, to that purpose, are sufficient overt acts of compassing his death.

It has frequently been held, that words committed to print or writing, and published, amount to an overt act of treason, to prove the compassing the king's† death; but even in such case it seems that a publication is necessary, though in arbitrary times, the contrary has been adjudged, particularly in the instances of Peachum‡, a clergyman, and of Algernon Sydney§; the former of whom was convicted for treasonable passages in a sermon never preached, and the latter for some speculative opinions contained in papers discovered in his private closet; but so unsatisfactory did the grounds of these convictions appear, that Peachum was not executed, and the attainder of Sydney was reversed.

A contempt of the king's person may be by imputing to him the want of capacity or integrity¶, by charging him with a breach of his coronation

* Haw. Pl. Cr. c. 17. s. 37. Fost. 202.

† 2 Rol. 89, 90. Fos. 346. 11 Modern, 322. 1 St. Tr. 977. 3 St. Tr. 228. 5 Bac. Abr. 117.

‡ Cro. Car. 125.

§ Foster, 198.

¶ Haw. Pl. Cr. c. 23. 4 Bl. Comm. 123.

oath*, cursing him, wishing him ill, spreading false rumours concerning his intentions†,—or, in short, by *maliciously* asserting any thing concerning him, which tends to lessen him in the esteem of his subjects, weaken his government, or raise jealousies between him and his people. These are considered as high contempts and misprisions, and are punishable as misdemeanors at Common Law.

So to deny the King's title to the crown, or to raise doubts concerning it, in unadvised discourse, would amount to a contempt at Common Law; and to do it deliberately and advisedly, if it did not constitute treason, would at least subject the offender‡ to the penalties of a præmunire.

In the reign of Elizabeth§, all the Justices and Barons of the Coif assembled at Serjeant's-Inn, concerning a book, devised by one Brown, containing the following passage, "Every preacher runneth to the Queen now, as though he were to be directed by her to tarry for reformations to be had for matters of the church. If the Magistrates will agree, all is well;—if they will not, they are not of the church, and it is a shame to tarry for them, or for a parliament, or proclamation." And it was held by all, that this was a moving of insurrection and sedition‖.

* Noy, 105. Haw. Pl. Cr. c. 23. s. 5.

† See 3 E. 1. c. 34.

‡ Black. Comm. 123. Haw. Pl. Cr. c. 17. s. 35.

§ Dig. L. L. 65.

‖ The question proposed was, whether the publication was

In the Digest* of the Law of Libel it is said, that at the same meeting, Sir Edmund Anderson, Ch. J. of the Common Pleas, propounded the following case to his brethren:—A person had caused the arms of the queen to be painted upon a post in a church in Suffolk, with this inscription painted near them, "I know thy works, that thou art neither hot nor cold; I would thou wert either hot or cold: therefore, because thou art lukewarm, it will come to pass that I will spew thee out of my mouth." But the Justices came to no resolution.

John Wilkes† was convicted upon an information filed by the Attorney-General‡, for printing and publishing a malicious libel, entitled The North Briton, No. 45, tending to vilify and traduce the King and his government—to impeach and disparage his veracity and honour—and to represent and make it believed that his Majesty's most gracious speech, delivered from his throne to the parliament, on Tuesday the 19th day of April, 1763, contained many falsities and gross impositions upon the public; and that his Majesty had suffered the honour and dignity of his crown to be sunk and prostituted, and the interests of his subjects and allies to be

an offence within the 23d Eliz. c. 2. which was a temporary stat.; but under the construction which the Judges put upon this book, it was a libel at Common Law.

* D. L. L. 66. Sav. 49.

† Dig. L. L. 69. Informations were also filed against Kerley and Williams, for printing and publishing the same.

‡ Charles Yorke, Esq.

treacherously betrayed; and also to render the king and his government contemptible and odious, and to excite tumults, commotions, and insurrections, &c. &c.

An information* was filed by the Attorney-General against the printer and proprietor of the Morning Chronicle newspaper, for publishing the following paragraph, with a malicious intent to alienate from the King the affections of his subjects:—"What a crowd of blessings rush upon one's mind, that might be bestowed upon the country, in the event of a total change of system. Of all monarchs, indeed, since the revolution, the successor of George the third will have the finest opportunity of becoming nobly popular."

Lord Ellenborough, C. J. in summing up to the jury, observed, "The first sentence admits of an innocent interpretation—'What a crowd of blessings rush upon one's mind, that might be bestowed upon the country, in the event of a total change of system.' The fair meaning of the expression, 'change of system,' I think, is a change of political system, not a change in the frame of the established government, but in the measures of policy which have been for some time pursued. By total change of system, is certainly not meant subversion or demolition; for the descent of the crown to the successor of his Majesty is mentioned immedi-

* Camp. Rep.

ately after. The writer goes on to speak of the blessings that may be enjoyed upon the accession of the Prince of Wales; and therefore cannot be understood to allude to a change inconsistent with the full vigour of the monarchical part of the constitution. Now I do not know that merely saying, there would be blessings from a change of system, without reference to the period at which they may be expected, is expressing a wish or a sentiment that may not be innocently expressed in reviewing the political condition of the country. The information treats this as a libel on the person of his Majesty, and his personal administration of the government of the country. But there may be error in the present system, without any vicious motives, and with the greatest virtues, on the part of the reigning sovereign. He may be misled by the ministers he employs, and a change of system may be desirable from their faults. He may himself, notwithstanding the utmost solicitude for the happiness of his people, take an erroneous view of some great question of policy, either foreign or domestic. I know of but one Being to whom error may not be imputed. If a person who admits the wisdom and virtues of his Majesty, laments that in the exercise of these, he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade his Majesty, or to alienate the affection of his subjects. I am not prepared to say that this is libellous: but it must

be with perfect decency and respect, and without any imputation of bad motives. Go one step further, and say or insinuate, that his Majesty acts from any partial or corrupt view, or with an intention to favour or oppress any individual or class of men, and it would become most libellous. However, merely to represent that an erroneous system of government obtains under his Majesty's reign, I am not prepared to say, exceeds the freedom of discussion on political subjects which the law permits. Then comes the next sentence: 'Of all the Monarchs, indeed, since the revolution, the successor of George the third will have the finest opportunity of becoming nobly popular.' This is more equivocal, and it will be for you, Gentlemen of the Jury, to determine what is the fair import of the words employed. Formerly it was the practice to say, that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more severe sense, but in the sense which fairly belongs to them, and which they were intended to convey. Now, do these words mean, that his Majesty is actuated by improper motives? or that his successor may render himself nobly popular by taking a more lively interest in the welfare of his subjects? Such sentiments, as it would be most mischevious, so it would be most criminal to propagate. But if the passage only meant that his Majesty, during his reign, or

any length of time, may have taken an imperfect view of the interests of the country, either respecting our foreign relations, or the system of our internal policy; if it imputes nothing but honest error, without moral blame, I am not prepared to say that it is a libel. The extract read at the request of the defendants, does seem to me too remote, in point of situation, in the newspaper, to have any material bearing on the paragraph in question. If it had formed a part of the same discussion, it must certainly have tended strongly to shew the innocence of the whole. It speaks of that which every body in his Majesty's dominions knows—his Majesty's solicitude for the happiness of his people; and it expresses a respectful regard for his paternal virtues. What connection it has with the passage set out in the information, it is for you to determine. Taking that passage substantively, and by itself, it is a matter, I think, somewhat doubtful, whether the writer meant to calumniate the person and character of our august Sovereign. If you are satisfied that this was his intention, by the application of your understandings honestly and fairly to the words complained of, and you think they cannot properly be interpreted by the extract which has been read from the same paper, you will find the defendants guilty. But if, looking at the obnoxious paragraph by itself, you are persuaded that it betrays no such intention; or if, feeling yourselves warranted to im-

port into your consideration of it a passage connected with the subject, though considerably distant in place, and disjoined by other matter, you infer from that connection that this was written without any purpose to calumniate the personal government of his Majesty, and render it odious to his people, you will find the defendants not guilty. The question of intention is for your consideration. You will not distort the words, but give them their application and meaning, as they impress your minds. What appears to me most material is the substantive paragraph itself; and if you consider it as meant to represent that the reign of his Majesty is the only thing interposed between the subjects of this country and the possession of great blessings, which are likely to be enjoyed in the reign of his successor, and thus to render his Majesty's administration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If, on the contrary, you do not see that it means, distinctly, according to your reasoning, to impute any purposed mal-administration to his majesty or those acting under him, but may be fairly construed an expression of regret that an erroneous view has been taken of public affairs, I am not prepared to say that it is a libel. There have been errors in the administration of the most enlightened men. I will take the instance of a man, who for a time administered the concerns of this country with great ability, although he gained his elevation

with great crime, I mean Oliver Cromwell. We are at this moment suffering from a most erroneous principle of his government, in turning the balance of power against the Spanish monarchy, in favour of the house of Bourbon. He thereby laid the foundation of that ascendency, which, unfortunately for all mankind, France has since obtained in the affairs of Europe. The greatest monarchs who have ever reigned—monarchs who have felt the most anxious solicitude for the welfare of the country, and who have in some respects been the authors of the highest blessings to their subjects, have erred; but could a simple expression of regret for any error they had committed, or an earnest wish to see that error corrected, be considered as disparaging them, or tending to endanger their government? Gentlemen, with these directions, the whole subject is for your consideration. Apply your minds candidly and uprightly to the meaning of the passage in question: distort no part of it for one purpose or another, and let your verdict be the result of your fair and deliberate judgment."

The King's character and title are further guarded by several legislative provisions. The 13th of Ed. 1. c. 34. enacts, that none be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord, may grow between the

* See Cro. J. 38. and the case of A. Scott, for publishing false news, O. B. June Sess. 1788. Haw. P. C. c. 23. s. 4.

King and his people, or the great men of the realm*.

By 6 Ann. c. 7. s. 7. it is made high treason to affirm, by writing or printing, that the King is not the lawful and rightful King of the realm, or that any other person has title to the same, otherwise than according to the Bill of Rights*, the Act of Settlement†, and the Act of Union, or that Parliament has not authority to limit the descent of the crown.

To assert that the Common Laws of the realm, not altered by Parliament, ought not to direct the right to the crown of England, is a misdemeanour, and punishable with forfeiture of goods and chattels ‡.

In the reign of Ed. 6. it was, by an act which expired with that King, made high treason to assert in print or writing, that he was not the supreme head of the church §.

By the 36th Geo. 3. c. 7. it is enacted, that if any person shall imagine or intend death, destruction, or any bodily harm to the person of the King, or to depose him, or to levy war, in order by force to compel him to change his measures or counsels, &c. and shall express and declare such intentions

* 1 W. & M. st. 2. c. 2. s. 9.

† 12 & 13 W. 3. c. 2.

‡ 13 Eliz. c. 1.

§ See also St. 23 Eliz. c. 2. which expired with that sovereign.

by *printing*, *writing*, or any overt act, he shall suffer death as a traitor.

And if any one by writing, printing, preaching, or other speaking, shall use any words or sentences to incite the people to hatred and contempt of the King, or of the government and constitution of this realm, he shall receive the punishment of a high misdemeanor; that is, fine, imprisonment, and pillory, and for a second offence, he is subject to a similar punishment, or transportation for seven years; at the discretion of the Court. The time of prosecution under the act is limited to six months, and the statute does not affect any prosecution at Common Law, unless a prosecution be previously commenced under the statute.

With regard to contempts committed against the person or title of the King, more perhaps has been said than was called for by any thing requiring explanation. Where the subject is convinced, that a particular measure has been adopted by any branch of government calculated to produce mischief, it is a duty which he owes his country to point it out; but where the supposed error is connected with the personal character of the sovereign, he is bound by the plainest rules of common decency, to make his representation in language the most moderate and respectful. Any personal reflection is sufficient to render the actor criminal; for it would be strange indeed, if that might be said or written of the monarch with impunity, which it

would be criminal to pronounce of one of his nobles, or to write concerning the meanest of his subjects.

Since, in contemplation of law, the affairs of the state are administered by the King, reflections upon the administration of government, or upon the capacities of those to whom it is immediately entrusted, are, by virtue of a similar construction, a contempt of the King himself.

It has been said by a high authority*, that "every freeman has an undoubted right to lay what he pleases before the public—to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity."

This privilege necessarily includes candid comments upon public affairs, and the mode in which they are conducted; since such cannot be considered in the abstract as falling within the meaning of the terms, improper, mischievous, and illegal.

On the trial of James Perry and another †, on an information for a libel, the Attorney-general, in his opening to the Jury, observed, "From the Bench you will hear laid down, from the most respectable authority, the law which you are to apply to those facts. The right of every man to represent what

* 4 Bl. Comm. 151.

† Before Ld. Kenyon, 1793. See Ridgway's Collection, &c. 2 vol. 371.

he may conceive to be an abuse or grievance in the government of the country, if his intention in so doing be honest, and the statement made upon fair and open grounds, can never for a moment be questioned. I shall never think it my duty to prosecute any person for writing, printing, and publishing, fair and candid opinions on the system of the government and constitution of this country, nor for pointing out what he may honestly conceive to be grievances, nor for proposing legal means of redress." When measures are fairly canvassed, and their defects, real or imaginary, pointed out with coolness and temper, it does not seem to have been contended, in modern times, that the line of duty has been transgressed, though the discussion may tend to prove the authors of those measures to be ill qualified for their situations. Party heat and zeal will overleap those bounds, or any, indeed, which decency might prescribe; and the thirst after honours and wealth, and, frequently, motives still more reprehensible, produce personal attacks upon character,—misrepresentation or exaggerated statements of matters of fact,—or downright lies fabricated to answer particular ends, and illustrated with inflammatory comments.

To prevent all excesses of this nature, without destroying at the same time the liberty of the press, would be as impracticable as to root out from human nature the passions which gave them birth; but though it may not be politic to interfere in

every instance where the bounds of rational discussion may have been overstepped, it seems clear that any such excess is illegal.

The test of intrinsic illegality must, in this as in other cases, be decided by the answer to the question, "Has the communication a plain tendency to produce public mischief, by perverting the mind of the subject, and creating a general dissatisfaction towards government?" This tendency must be ascertained by a number of circumstances capable of infinite variety; it is evidenced by the wilful misrepresentation or exaggerated account of facts which do exist, or the assertion of those which do not, mingled with inflammatory comments, addressed to the passions of men and not to their reason, tending to seduce the minds of the multitude, to irritate and inflame them.

It may be said, where is the line to be drawn? Discontent may be produced by a fair statement of facts, inasmuch as it is very possible for an imbecile or corrupt man to be employed in the administration of public affairs. To this it may be replied, that to render the author criminal, his publication must have proceeded from a *malicious* mind, bent not upon making a fair communication for the purpose of exposing bad measures, but *for the sake* of exciting tumult and disaffection. The Judge, who presides at the trial, is bound by the law of the land, to deliver his opinion to the Jury upon the quality and tendency of the publication; and the

defendant cannot be convicted, unless that Jury be convinced of the unfairness, that is, of the malice of the representation.

It would exceed the proposed limits of this treatise, to cite cases in detail under this division; every case, indeed, falling within it, is too intimately involved in its particular circumstances to admit of any abstract less general than the elements which have been laid down as essential to the libellous quality, the plain intrinsic tendency* of the communication to produce public disorder, and the malicious intention of its author.

A person delivered† a ticket up to the minister after a sermon, wherein he desired him to take notice, that offences passed now without control from the civil magistrate, and to quicken the civil magistrate to do his duty, &c. This was held to be a libel, though no magistrates in particular were mentioned, and though it was not averred that the magistrates suffered these vices knowingly. And the ground of the conviction has been stated to be, that general misrepresentations of the government or state of the nation, or mutinous hints, tend to excite discontent and sedition in the people, and

* See R. v. Beare, 12 Mod. 221. Ld. Ray. 418. Dig. L. L. 19. 121. R. v. Bedford, 2 Str. 789. Rex v. Owen, K. B. MSS. Dig. L. L. 67. R. v. Lawrence, 12 Mod. 311. R. v. Bliss, clerk, K. B. MSS. 5 G. 1. Dig. L. L. 122.

† Sid. 219. Keb. 778. Bac. Ab. tit. Libel, 450. 16 Car. 2.

that the generality of the reflection made it the more dangerous, since it had a bad effect on the whole frame of government*.

Lawrence was convicted† upon an information charging him with having sent a letter to Sir John Pigot, desiring him to moderate his zeal, for that the King (meaning King James II.) would soon be restored; and that for further satisfaction herein, he would soon hear that many lords would repair to him to France, what to do he might guess. The defendant was fined forty marks.

John Tutchin was convicted‡ upon an information for publishing the several libels containing the following paragraphs:

"If we may judge by our national miscarriages, perhaps no nation in Europe has felt the influence of French gold more than England; and worthy it is our greatest lamentation, that our dear country should be thus weakened by men of mercenary principles, when countries, inferior to us in strength and riches, are secured from attempts of this nature only by the fidelity of their people. What is the reason that French gold has not affected Holland as well as England, but that their ministry is such as is entirely in the interest of their country, and altogether incorruptible. They prefer men

* Dig. L. L. 5.
† 12 Mod. 311. Dig. L. L. 121.
‡ 5 St. Tr. 582. 3 Ann. 1704.

that are knowing in their posts, and are active in business, when in England we find out offices for men, and not men for offices. By this, and by preferring men by interest and favour, have the excise, the customs, and other branches of the revenue, intolerably sunk, and by this means has the navy of England, our chief support, been hitherto perfectly bewitched. And can Lewis spend his money better, than in getting men into office in England, who are either false or ignorant in the business, or who are his friends."

Ld. Holt C. J. in summing up to the Jury, observed, "To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If persons should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government, than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished. Now you are to consider, whether these words I have read to you, do not tend to beget an ill opinion of the administration of the government."

John Clarke* was found guilty upon an information, charging him with having printed and published a malicious libel, intituled "Mist's weekly

* 9 St. Tr. 273. Feb. 25, 1729.

Journal," containing false, malicious, and seditious reflections on his late and present majesty, by drawing odious parallels, and thereby maliciously and falsely insinuating our government to be tyrannical, and the ministry corrupt and abominable.

Richard Franklin* was found guilty upon an information, charging him with having printed and published a malicious libel, intituled "No. 235. The Country Journal, or the Craftsman," containing an extract from a private letter from the Hague, with intent *(inter alia)* to scandalize and vilify the administration of his Majesty's government of this kingdom, and his principal officers and ministers of state, and to represent his said officers and ministers of state as persons of no integrity and ability, and as enemies to the public good of this kingdom.

William Cobbett † was tried upon an information for publishing a libel in the Weekly Register, entitled "Juverna." Ld. Ellenborough, C. J. in summing up to the jury, observed, "It is no new doctrine, that if a publication be calculated to alienate the affections of the people by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person, so conducting himself, is exposed to the inflictions of the law. It is a crime; it has ever been considered as a crime, whether wrapt in one form or another. The case

* 9 St. Tr. 255. † E. T. 1804.

of the King v. Tutchin, has removed all ambiguity from the question; and although at the period when that case was decided great political contentions existed, the matter was not again brought before the Judges of the Court upon any application for a new trial."

In a subsequent part of the same charge, his Lordship added, "It has been observed, that it is the right of the British subject to exhibit the folly or imbecility of the members of the government. But, gentlemen, we must confine ourselves within limits. If in so doing individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal visitation*."

In all these cases it may be laid down as a general rule, that though the discussion of political measures is innocent in the abstract, their discussion must not be made a cloak for an attack upon private character, which is of itself a substantive injury, independent of its political connexion.

* Note. For other illustrations of this subject, see the cases of Ld. Balmerino, 10 Car. St. Tr. Seven Bishops, 4 Jac. 2. St. Tr. Brewster, 15 Car. 2. St. Tr. Brookes, 15 Car. 2. St. Tr. Henry Carr, 31 Car. 2. St. Tr. Fitzgerald, 1 Ann. Salk. 401. Johnson, 2 Ja. 2. Show. Rep. 488. Leighton, 6 Car. 1. St. Tr. Owen, 25 Geo. 2. Dig. L. L. 68. Pain, Salk. 281. 5 Mod. 163. Prynne, Sid. 219. Keb. 773. 16 Car. 2. St. Tr. Sacheverell, Dr. St. Tr. and the more modern cases of Finnerty, Lovel, Drakard, Cobbett, and Gale Jones.

It may be asked, how can members of the government be blamed without an injury to their feelings, bad measures can be derived but from one or both of two sources, knavery and folly. The plain and obvious answer seems to be, that as far as the prejudice to private character or feelings results simply from the exposure of an absurd and inefficient measure, the author must be content to bear with it; he has made himself in some sort *publici juris*, by undertaking to act in a public capacity; and, therefore, has no right to complain on account of any personal inconvenience, which may accrue from a fair comment upon his execution of that duty. He seems to stand in a situation similar to that of the author of a book, who, as far as he identifies himself with his work, is the fair object of criticism, however disagreeable it may prove to his private feelings.

The line of distinction seems plain between a fair discussion of the merits of any measure adopted by government, and an attack upon the private characters of those who proposed it; if the measure be bad, policy requires that the error should be made public, but the same policy can never justify either general or particular imputations on the integrity of individuals; if there be ground for such a charge the guilty party is amenable to the laws, and it is the duty of the accuser to apply to the proper tribunal, and not to allow the crimination to rest on his own bare assertion; if the fact be doubtful, the

necessity for judicial examination, in opposition to bare assertion, is still stronger: if the charge be a mere fiction, the calumniator attempts to impose upon and injure his country, by destroying the characters of those who are watching over its interests,—an act of guilt, the malignity of which can scarcely be exceeded.

Next, as to publications affecting the administration of justice.

Contempts against the King's Judges, and scandalous reflections on their proceedings, fall within the same consideration with the former class of offences, since nothing tends more to disturb public order than to infuse suspicions concerning the administration of justice.

Offences of this nature may consist either in the more gross violation of decency, by making use of contumelious and insolent language in the face of the court; or in the publishing of reflections on the purity of its proceedings, tending to obstruct the course of justice.

Generally, any contemptuous or contumelious words, when spoken to the Judges of any courts, in the execution of their office, are indictable*. As if one give the lie† to a Judge of a Court Leet, in the face of the court; or, being admonished by him to pull off his hat, say‡, "I do not value what you

* 1 Sid. 144. Str. 420. 2 Rol. Ab. 78.
† Ow. 113. Mo. 470. Cro. Eliz. 581.
‡ Ray. 78. 1 Keb. 451. 465.

can do;" or tell him, in the face of the court, that he is forsworn*, or call him a fool†, or say, "If I cannot have justice here, I will have it elsewhere‡."

When reflecting words are spoken of the Judges of the superior Courts, at Westminster, the speaker is indictable both at Common Law and under the statutes of Scandalum Magnatum, whether the words relate to their office or not.

But it seems that no indictment lies for contemptuous words spoken either of or to inferior Magistrates, unless they be in the actual execution of their duty, or at least unless the words affect them directly in their office, though it may be good cause for binding the offender to his good behaviour§.

Next, where the publication reflects upon the administration of justice.

Hurry‖ had summoned Watson, who was a member of a corporate body, into a Court of Requests, to recover the sum of 11s. Hurry was afterwards indicted by Watson for perjury, alleged to have been committed in the Court of Requests, and was acquitted on the merits. Hurry then brought an action against Watson, for a *malicious* prosecution, in which he recovered £3000

* 2 Rol. Ab. 78.

† Cro Eliz. 78.

‡ 1 Sid. 144. Keb. 508.

§ 6 Mod. 125. Haw. Pl. C. c. 21. s. 13.

‖ The King v. Watson and others, 2 T. R. 199.

damages, and the court refused to set aside the verdict. A majority of the corporation afterwards entered a resolution in their books, asserting, "that *Mr. Watson had been actuated by motives of public justice*," and voted him the sum of £2300.

An information was applied for, one ground for which was, that the terms of the order constituted a high contempt of the administration of justice. On granting the information, Ashhurst, J. observed, "The assertion that he was actuated by motives of public justice, carries with it an imputation on the public justice of the country; for if these were his only motives, then the verdict must be wrong."

And Buller, Justice, "Nothing can be of greater importance to the welfare of the public than to put a stop to the animadversions and censures which are so frequently made upon courts of justice in this country; they can be of no service, and may be of the most mischievous consequences. Cases may happen in which the Judge and Jury may be mistaken: when they are, the law has afforded a remedy, and the party injured is entitled to pursue every method which the law allows to correct the mistake; but when a person has recourse to a writing like the present, by publications in print, or by any other means, to calumniate the proceedings of a court of justice, the obvious tendency of it is to weaken the administration of justice, and in con-

* Sittings after Easter Term, 48th Geo. 3d.

sequence to sap the very foundation of the constitution itself."

An information had been filed* by the Attorney-general against White and others, for an abusive comment on the conduct of a Judge and Jury, by whom a person had lately been tried for murder, and acquitted. Upon the trial of the defendants for the libel, Mr. Justice Grose informed the jury, that in case they were of opinion that the publication had been made, not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country, they ought to find the defendants* guilty.

The same policy which prohibits seditious comments on the King's conduct and government, extends, on the same grounds, to similar reflections on the proceedings of the two Houses of Parliament. These bodies, so essential a part of the constitution, are at all events entitled to reverence and respect on account of the great and important public services which they are bound to discharge. They have exercised, from very early times, those means of repressing immediate insults and contempts of their authority, which are essential at least to their dignity, if not to their very existence; nevertheless, they have been sparing in the exercise of their extensive and apparently undefined powers, and

* The Jury found them guilty, and they were sentenced to three years imprisonment.

have, in many instances, waived their privileges, and delivered over offenders to be dealt with by the Common Law. It seems to have been the policy of the courts to encourage such a proceeding; and it is no less the duty of juries to pay a ready attention when proof of such insults is submitted to them.

It will be sufficient to glance slightly upon the consequence likely to arise from a contrary conduct; the compelling those important assemblies to redress their own affronts—a measure necessarily irksome to them, since they are obliged to unite characters which the general policy of the law has, except in these and other cases of necessity, kept asunder, and which, if very frequently resorted to, might eventually introduce disagreeable discussions as to the extent of those most important and essential privileges.

In the case* of the King v. Rayner, the defendant having been convicted of printing a scandalous libel upon the Houses of Lords and Commons, called "Robin's Reign, or Seven's the Main;" the court set a fine of £50 upon him—committed him for two years, and until he should pay the fine—and likewise till he should find security for his good behaviour for seven years.

William Owen† was tried upon an information

* 2 Barnard. K. B. 293, Dig. L. L. 125.

† Michs. 25 G. 2. K. B. MSS. Dig. L. L. 67.

exhibited against him for publishing a malicious libel, entitled "The Case of the Honourable Alexander Murray, Esq. in an Appeal to the People of Great Britain," &c. tending to scandalize and vilify the whole body of the Commons in Parliament assembled; to represent the proceedings in Parliament as cruel, arbitrary, and oppressive; to make it believed that the Commons in Parliament assembled had acted, in their legislative capacity, in open violation of the Constitution; and also to represent the said House of Commons as a Court of Inquisition, &c. &c. &c.

Upon the publication of this alleged libel by the defendant, the Commons addressed the King, desiring his majesty to give orders to prosecute the publisher, which was* done.

After the impeachment of Mr. Hastings, a review of the articles of impeachment was published, by John Stockdale. Upon the suggestion of Mr. Fox, one of the managers of the impeachment, the House unanimously voted an address to the King, praying his majesty to direct his Attorney-general† to file an information against Mr. Stockdale, as the publisher of a libel upon the Commons. The Attorney-general, on opening the case to the Jury, after stating the address of the Commons, proceeded

* He was tried before Lord C. J. Lee and acquitted.

† Sir Archibald Macdonald, now Lord Chief Baron of the Court of Exchequer.

to observe, "I state it as a measure which they have taken, thinking it, in their wisdom, as every one must think it, to be the fittest to bring before a jury of their country an offender against themselves, avoiding thereby, what sometimes indeed is unavoidable, but which they wish to avoid whenever it can be done with propriety, the acting both as judges and accusers, which they must necessarily have done, had they resorted to their own powers, which are great and extensive, for the purpose of vindicating themselves against insult and contempt, but which, in the present instance, they have wisely forborne to exercise, thinking* it better to leave the offender to be dealt with by a fair and impartial Jury."

* Ridgway's Speeches of the Hon. T. Erskine.

Note.—Scandalous reflections upon the grandees of the realm fall within the division of the subject which has been considered in the last chapter; but since the proceeding by writ of Scandalum Magnatum is of a civil as well as of a criminal nature, the extent of the injury has been treated of in a previous chapter, (VI.) to which the reader is referred.

CHAPTER XXXIV.

Publications against Convenience.

NEXT, every publication is intrinsically illegal, which tends to produce any public inconvenience or calamity. Under this division, those rank the first in respect of the magnitude of their results, which tend to interrupt the good understanding which prevails between this country and others, by malicious reflections upon those who are possessed of high rank and influence in foreign states. Since the natural tendency of these is to involve the government in a foreign war, their authors have, in several instances, been punished as offenders at Common Law.—Thus, in the case* of the King v. D'Eon, an information was filed against the defendant by the Attorney-general†, for publishing a libel upon the Count De Guerchy, who was at that time residing in this kingdom, in the capacity of Ambassador from the court of France. The information charged the defendant with an intention to defame the character and abilities of the Count De

* Easter T. 4 G. 3. 1764. K. B. MSS. Dig. L. L. 88.

† Sir Fletcher Norton.

Guerchy—to render him ridiculous and contemptible—to arraign his conduct and behaviour, in his character of Ambassador—and to cause it to be believed that he had, after his arrival in this kingdom, been guilty of unjust, unwarrantable, and oppressive proceedings towards the defendant and his friends; and to insinuate, that he was not fit or qualified to execute the office and functions of Ambassador. The defendant was convicted.—Lord George Gordon* was found guilty upon an information, for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction; and Mr. Justice Ashhurst, in passing sentence, observed, that unless the authors of such publications were punished, their libels would be supposed to have been made with the connivance of the state.—The defendant, John Vint†, was found guilty upon an information, charging him with having published the following libel, "The Emperor of Russia is rendering himself obnoxious to his subjects, by various acts of tyranny; and ridiculous in the eyes of Europe, by his inconsistency: he has lately passed an edict, to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged

* Hil. 28 G. 3. The defendant was sentenced to pay a fine of £500, to be imprisoned in Newgate for the space of two years, and afterwards to give security for his good behaviour for the space of fourteen years.

† 40 G. 3.

law, a hundred sail of vessels are likely to return to this country, without their freight," with intent to traduce the Emperor of Russia, and to interrupt and disturb the friendship subsisting between that country and Great Britain.

Jean Peltier was found guilty upon an information, charging him with having published a malicious libel, with intent to vilify Napoleon Bonaparte, the Chief Consul of the French Republic, and to excite and provoke the citizens of the said republic to deprive the said Napoleon Bonaparte of his consular dignity, and to kill and destroy him, and to interrupt the friendship and peace subsisting between our Lord the King and his subjects and the said Napoleon Bonaparte and the French republic. The most obnoxious passages of the libel were these: "O! eternal disgrace of France;—Cæsar, on the banks of the Rubicon, has against him in his quarrel, the Senate, Pompey, and Cato; and in the plains of Pharsalia, if fortune is unequal, if you must yield to the destinies, Rome in this sad reverse at least remains to avenge you a poignard among the last Romans." "As for me, far from envying his (Bonaparte's) lot, let him name (I consent to it) his worthy successor; carried on his shield, let him be elected Emperor. "Finally (and Romulus recals the thing to mind), I wish that on the morrow he may have his apotheosis. Amen!"—Upon the trial, Lord Ellenborough, C.

J. referred to the cases of Lord George Gordon and Vint, and said, "I lay it down as law, that any publication which tends to disgrace, revile, and defame persons of considerable situations of power and dignity in foreign countries, may be taken to be, and treated as a libel; and particularly where it has a tendency to interrupt the amity and peace between the two countries."

By the statute 35 H. 8. c. 14.* it is made felony to declare any false prophecy upon occasion of arms, fields, or letters.

By st. 5 Eliz. c. 15. "If any person advisedly and discreetly advance, publish, or set forth by writing, printing, saying, or any other open speech or deed, to any person or persons, any fond, fantastical, or false prophecy, upon or by the occasion of any arms, fields, beast, badges, or such other like things accustomed in arms, cognizances, or signets, or upon or by reason of any time, year, or day, name, bloodshed, or war, to the intent thereby to make any rebellion, insurrection, dissention, loss of life, or other disturbance, within the realm, &c. upon the first conviction, he shall suffer one year imprisonment, and pay a fine of £10, and for a second offence, shall suffer imprisonment during life, and forfeit all goods and chattles, real and personal. But it is provided, that no one shall be imprisoned

* See also 3 and 4 Ed. 6. and 7 Ed. 6.

for any offence against the act, unless within six months after the offence committed."*

It has been from early times considered as an offence at Common Law, to attempt by means of false rumours to raise the price of provisions, or other necessaries of life.

In 43 Ass.† it was presented that a Lombard did procure to promote and enhance the price of merchandize, and the Lombard demanded judgment of the presentment for two causes—1. That it did not sound in forestalling;—2. That of his endeavour, or attempt by words, no evil was put in ure, that is, no price was enhanced; but both objections were overruled. "Whereby," says Sir E. Coke‡, "it appears that to attempt by words to enhance the price of merchandise, was punishable by law, and did sound in forestalment."

And from§ the same report it appears, that to attempt by such rumours to diminish the price of any staple commodity, to the prejudice of the dealers in general, is likewise an offence at Common Law; for it is there said, "Knivet reported that certain people came to Coteswold, in Hereford-

* By 23 Eliz. c. 2. it was made felony to cast the nativity of the Queen, or to seek to know and set forth how long the Queen shall live, or who shall reign after her decease, or to utter any false prophecies to any such intent, or to wish or desire the death or deprivation of the Queen.

† P. 38.

‡ 3 Ins. 896.

§ 43 Ass. p. 38.

shire, and said, in *deceit* of the people, that there were such wars beyond seas, as no wool could pass or be carried beyond seas, whereby the price of wool was abated; and upon presentment thereof made, they appeared, and upon their confession, they were put to fine and ransom."

And in* Mich. Term, 39 and 40 Eliz. it was, after conference and mature deliberation, resolved by all the Justices, that every practice or device, by act, conspiracy, words, or news, to enhance the price of provisions, or other merchandise, was punishable by law.

An information† was filed, charging the defendant, that he, intending to enhance the price of hops, did, at Worcester, in the hearing of divers hop dealers and planters, declare, that the then present stock of hops was nearly exhausted, and would be exhausted before the crop of hops then growing could be brought into the market, and that there would soon be a scarcity of hops, with intent and design, by such rumours and reports, to induce dealers in hops not to carry any to market for sale. When the defendant‡ was brought up to receive

* 3 Ins. 196. Bro. Iud. pl. 40.

† R. v. Waddington, 1 E. 143.

‡ He was convicted before Mr. J. Le Blanc, at Worcester, and when brought up to receive sentence, the court, out of mere indulgence, allowed his counsel to go fully into the case, saying, that if it appeared that judgment ought to be arrested, or a new trial granted, the defendant should not be precluded from the advantage.

judgment, his counsel objected that the counts charging him with having spread rumours to enhance the price of hops, did not aver* that the rumours were false, and that it should at least have been stated, that the price of the commodity had, in fact, been raised by the rumours. But there were other counts in the information, charging the defendant with having engrossed large quantities of hops, with intent to prevent the same from being brought to market, and to resell the same at an exorbitant profit, and thereby greatly to enhance the price of hops; and the defendant was adjudged to pay a fine of £500, and to be imprisoned for one month.

The court does not, in the above case, appear to have given an express opinion upon the indictable quality of the offence described in the two first counts, which consisted in the spreading rumours generally, with intent to enhance the price; nor was this necessary, since the information contained independent charges which were deemed sufficient, and upon which the judgment appears principally to have been founded. It was contended by the counsel for the prosecution, that "the spreading rumours, whether true or false, if done with a mischievous intent, to produce a public detriment, is indictable upon general principles of law, in the same manner as publishing a libel, however true the facts stated may be; and that in Jolliffe's

* See Haw. P. C. c. 80. s. 1.

is perfectly clear that the adviser is liable to be punished for his wilful attempt to violate the law, through the agency of another.

And secondly, the holding out any indirect but forcible motive, to induce the commission of an illegal act, is in itself indictable.—Thus, it is not only illegal to send a challenge to fight, but even an attempt to provoke† another to send such a challenge, is a misdemeanor, since the endeavour is an act done towards the accomplishment of such crime‡.

With respect to communications tending to acts of personal violence, there is an important distinction between words spoken, and written, or printed publications; the former are not indictable, though scurrilous, and reflecting upon the character of an individual, and even addressed personally to him, unless they§ amount to a direct solitation to a breach of the peace, as by a challenge to fight. The defendant‖ said to the mayor of Salisbury, "You, Mr. Mayor, are a rogue and a rascal;"

* R. v. Phillips, 6 E. 464. R. v. Southerton, 6 E. 126. R. v. Higgins, 2 E. 5.

† By 22 G. 2. c. 23. "If any person, on board the fleet, shall use reproachful or provoking speeches or gestures, tending to make any quarrel or disturbance, he shall, upon being convicted thereof, suffer such punishment as a Court Martial shall impose.

‡ 6 E. 464.

§ 6 Mod. 125. Ld. Ray. 1030.

‖ The Queen v. Langley, 6 Mod. 125.

and it was held, after great deliberation, that the words were not indictable, since they were not spoken to him in the execution of his office; that if they had been put into writing, they would have constituted a libel, which would have supported either an indictment or an action; but that they were but loose and unmannerly words, like those spoken of an Alderman of Hull—"When he puts on his gown, Satan enters into it," which were adjudged not indictable; and Holt, C. J. said, that words directly tending to a breach of the peace, may be indictable; but otherwise, to encourage indictments for words, would make them as uncertain as actions for words are.

But it seems perfectly settled, that any malicious defamation of any person, expressed in print or in writing, or by means of pictures or signs, and tending to provoke him to anger and acts of violence, or to expose him to public hatred, contempt, and ridicule*, amounts to a libel in the indictable sense of the word. And since the reason is, that such publications create ill blood, and manifestly tend to a disturbance of the public peace, the degree of discredit is immaterial to the essence of the libel, since the law cannot determine the degree of forbearance which a party reflected upon will exert

* 3 Black. Com. 150. Haw. Pl. Cr. c. 73. s. 1. 5 Co. 125. 5 Mod. 165. Salk. 418. Str. 422, 791. 12 Mod. 221. Ld. Ray. 416. 1 Sid. 270.

before he is excited and provoked to acts of outrage, and therefore prohibits equally all imputations conveyed by such means, and possessing such a tendency.

The grounds of the distinction between oral and written provocation, are to be sought after in practical wisdom and experience, rather than in principle, inasmuch as the tendency to produce illegal violence is oftentimes stronger in the former case than in the latter: for instance, contumelious and insulting language is more likely to inflame the party to whom it is applied, to acts of outrage, when uttered publicly in his hearing, than if even the same expressions were to be conveyed to him by a private letter, when the insult would be divested of its main aggravation,—its publicity,—and the distance of the offended party from the aggressor would allow the irritation which did ensue an opportunity to subside, without venting itself in an act of violence.

Since the indictable and actionable qualities of a libel, upon a living individual, seem to have been considered as co-extensive*, what has been said in regard to the extent of the remedy by action, may be applied as the measure of criminal liability.

An indictment† also lies for a libel reflecting

* Skinn. 123. 2 Wils. 204. Com. Dig. tit. Libel, c. 3. Bac. Ab. tit. Slander, 202. 3 Bl. Com. 125. 2 Camp. R. 511.

† 5 Co. 125. Haw. Pl. Cr. c. 73. s. 1. The King v. Topham, 4 T. R. 126.

upon the memory of a person who is dead, if it be published with a malevolent purpose to injure his family and posterity, and to expose them to contempt and disgrace; for the chief* cause of punishing offences of this nature, is their tendency to a breach of the peace; and although the party be dead at the time of publishing the libel, yet (according to Lord Coke) it stirs up others of the same family, blood, or society, to revenge, and to break the peace.

In the case of the King v. Chrichley†, an information was granted against the defendant, for publishing the following libel, reflecting upon Sir C. Gaunter Nicoll, Lady Dartmouth's father, and on the government: "On Saturday evening died of the small pox, Sir C. G. Nicoll, Knight of the most honourable order of the bath, and representative in Parliament of the borough of Peterborough. He could not be called a friend to his country, for he changed his principles for a red ribband, and voted for that pernicious project, the excise." But, as was observed by Lord Kenyon, C. J. in the case of the King v. Topham‡, "To say that the conduct of a dead person can at no time be canvassed; to hold that, even after ages are past, the conduct of bad men cannot be contrasted with that of the

* Haw. Pl. Cr. c. 73. s. 3. 5 Co. 125.

† 4 T. R. 129. in the notes.

‡ 4 T. R. 129.

good, would be to exclude the most useful part of history." The malicious intention of the defendant, therefore, to injure the family and posterity of the deceased, must be expressly averred and clearly proved.

And it is not necessary that the libel should reflect upon the character of any particular individual*, provided it immediately tend to produce tumult and disorder.

An information† was prayed against the defendant for publishing a paper, containing an account of a murder committed upon a Jewish woman and her child, by certain Jews lately arrived from Portugal, and living near Broad-street, because the child was begotten by a Christian; and the affidavit set forth, that several persons mentioned therein, who were recently arrived from Portugal, and lived in Broad-street, had been attacked by multitudes, in various parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more; and it was objected, that no information could be granted, because it did not appear, in particular, who the persons reflected upon were. But by the court, "Admitting that an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanour, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults

* 8 Bac. Abr. 494. 2 Barnard, K. B. 138. 166. The King v. Osborne, D. L. L. 79.

and disorder among the people, and inflame them with an universal spirit of barbarity, against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible."

It may be objected, that when a party is provoked by a libel to acts of violence, the breach of the peace is to be attributed to the hasty temper of the person provoked, and that the violation of good order ought to be visited upon him, and not upon the writer, whose language supplies no justification of the violence committed. The answer seems to be, that though the party violating the peace derives no justification from the provocation offered, this circumstance does not exculpate the original aggressor, since he did that which occasioned the illegal act, and which, calculating upon the infirmities of human temper, was likely to occasion it; the offence was the natural, though the illegal consequence of the publication; the defendant caused it to be committed; and with respect to the public, it is immaterial whether he directly solicited another to break the law, or effected the same end by means indirect, but equally certain.

The principle upon which a party is made responsible for an offence committed at his instigation, but by the agency of another, pervades the whole system of our criminal code, and applies strongly to the case of libel; since no reasonable distinction can be made between actual solicitation

and any other means of procuration known to be equally powerful.

An actual breach of the peace, is therefore a consequence which, upon legal principles, is to be attributed, in some degree, to the author of the libel which excited it, and his attempt to produce disorder is punishable on grounds of the plainest policy, inasmuch as it is wiser to prevent the evil apprehended, by a timely vigour, than to wait for its maturity.

CHAPTER XXXVI.

Of the Defendant's Malice.

TO constitute a crime against human laws, a vicious will must concur with an unlawful* act; and as the union of the defendant's wrongful intention with the plaintiff's loss, creates the title of the latter to damages, so, to render a party criminally responsible, the act obnoxious to the public must result from a malicious mind†.

As far, therefore, as respects the intention of the party, the offence against the public is identified with the injury to the individual; and the cases differ only in the nature of the mischief, which, in the former, results to the plaintiff, in the latter, to the community;—the observations, therefore, which have been already made upon the nature of malice in its legal sense, the presumptions for and against it, and the evidence relating to it, apply equally to the present branch of the subject.

* 4 Bl. Comm. 21.

† Haw. c. 73. s. 1. 5 Co. 125. 5 Mod. 165. Salk. 418. 4 Bl. Comm. 125. Str. 422. 791. 12 Mod. 221. R. v. Ld. Abingdon, 1 Esp. R. 228.

With respect, then, to the question of malice, the cases falling within the criminal as well as within the civil division, may be resolved into the three classes already specified.

1. Where the actual intention of the party is immaterial, and the presumption of law is conclusive in favour of the defendant; as where the publication is made in the regular course of parliamentary or judicial proceedings*.

2. Where the presumption is *primâ facie* in favour of the defendant, but liable to be rebutted by proof of express malice.

3. Where the presumption is against the defendant, and the law, in the absence of any justifying excuse shewn by the defendant, collects an evil intention from the evil tendency of his act.

It has already been seen to which of these divisions the defendant's case, under its particular circumstances, most properly belongs; and the observations already made are equally applicable to the criminal proceeding, with the following exceptions.

1. The truth of a publication supplies no defence to an information or indictment. The reason why a plaintiff in such case is debarred from recovering a compensation in damages, has already been considered. He is excluded from the courts by his own demerits; but to the criminal proceeding, the person libelled is not a party; no defect, there-

* Vid. supra, c. 10, 11.

fore, in his claim, can avert from the offender that punishment which the security of society demands*.

Though it has long been settled, that the truth of a libel is no defence under an indictment, it may not be improper to offer a few remarks upon a doctrine against which objections have been frequently urged.

The two essentials to constitute an indictable misdemeanor, are, the michief resulting, or likely to result, to society, from a particular act; and the malicious intention of the actor, to effect such mischief; and hence it is, that every wilful attempt or instigation, direct or indirect, to violate the law, is considered as criminal.

The policy of the rule seems indisputable. No society can tolerate a wilful attempt to break its laws; and the question is, whether a person who publishes concerning another that which is true, but which is likely to provoke him to commit an illegal act, may not fall within the rule. In the first place, the illegal act resulting from such a publication, that is, the breach of the peace, must be considered in relation to society, as the consequence of the publisher's act; for though the defamation will by no means justify the person defamed in the committing any act of violence, pa

* 4 Bl. Com. 151. 5 Rep. 125. 11 Mod. 99. Bac. Ab. tit. Lib. 455. Hob. 253. 3 Salk. 226. Holt. R. 422. Haw. P. C. b. 73. s. 6.

ticularly where he has been guilty of that which is imputed, yet the blame is at least partially attributable to him who wantonly and maliciously did that which was likely to occasion the illegal consequence.

The right of every person to publish truth in the abstract is clear; but this natural privilege, like all others, is liable to be abridged, when the exercise of it becomes pernicious. The law affords many instances, in which acts in themselves innocent, are, from some collateral evil accruing to the public, considered as criminal. Thus, the carrying on a particular trade may be in itself not only innocent, but necessary; yet it becomes illegal when attended with circumstances affecting the health and comforts of those who reside in the neighbourhood. So in the case of libel, the right to publish the truth in general is plainly distinguishable from the right to publish when the publication is likely to be attended with mischief; in such case the publisher cannot but be considered as the author of those consequences which, knowing the infirmities of human nature, he caused to exist.

Supposing, then, that mischief may result from publishing the truth, can such publication be attributed to a malicious disposition to effect such mischief? An illegal act is, in contemplation of law, malicious, when it is effected with a knowledge of the consequences which are likely to ensue; since every person must be presumed to have had that

end in view to which the means he used were adapted. Though the immediate object, therefore, of the defendant, may be to wound the feelings of an individual, yet, if the obvious tendency of his publication be to exasperate the party reflected on to acts of outrage, he must, in the absence of all means of justification, be presumed to have contemplated a violation of the public tranquillity.

Upon these principles, as far as regards intention, it is immaterial whether the charge imputed be true or false; the mischief is as great in the latter case as in the former, since guilt is at least as prone to revenge as innocence; and it is clear, that truth as well as falsehood may be converted into the instrument of malice*. These observations apply to cases where the act can be attributed to no motive, but a design to produce misery to the individual, attended with that criminal inattention to the interests of society which constitutes malice in its legal sense. Where the defendant can shew that he had in view either the interests of society in general, or the benefit of the individual, however mistaken his zeal may be, that vicious intention is wanting, the addition of which would constitute him a criminal. As far as the convenience and exigencies of society require, every person is justified in publishing the truth; the prohibition does

* See Paley's Moral Philosophy, ch. on Slander.

not extend beyond communications, originating in malice and terminating in mischief.

In theory, perhaps, there may be some room for a distinction between cases where the offence imputed by the libel is of an indictable nature, and those where a mere immoral act is charged; in the former, if the fact be written with the knowledge of the party, he is bound to declare it to the proper tribunal, for the purposes of justice, and would, in many instances, be liable to an indictment for the concealment; but where the act is of a mere immoral nature, as of ingratitude or hypocrisy, no avenue for the disclosure is appointed by the law; in such case, therefore, it seems more reasonable, that the actual misconduct should be made known at the discretion of the individual acquainted with it. As far as oral communication goes, the privilege is allowed in its fullest latitude; and though the grounds of the distinction between oral and written publications are not always obvious, the practice of centuries may have proved oral communication to be sufficient for the purpose of restraining the unprincipled, by the dread of exposure, without extending the impunity to the more deliberate and malicious act of making the same disclosure in writing.

But though the truth of a publication (inasmuch as it may consist with both the essentials to the offence) cannot constitute a distinguishing boun-

dary between criminality and absolute innocence, yet it may materially affect the measure of punishment. For this purpose, the defendant is entitled to exhibit the truth of that which he has asserted, upon* affidavits before the court, and may verify the statement by his own oath—an advantage of which he could not have availed himself upon the trial under any circumstances.

These reasons, which have been urged as the ground of rejecting evidence of the truth of a libellous charge as a complete defence to an indictment or information, apply to cases where the prosecutor is really guilty of the criminal or immoral act imputed: in other instances, the same principles apply with a still superior force, strengthened by circumstances peculiar to themselves.

Thus, where the libel consists in the holding up an individual to ridicule, by exposing some personal deformity, in a lampoon or print, the truth of the representation would certainly aggravate the ridicule, and would by no means lessen the malice of the author.†

With respect to libels against religion, morality, or the constitution, the permitting such a defence

Tit Lib 456

* Dig L. L. 16. 3 Bac. Ab. 495. 4 Bac. Ab. 516.

† Puta si alter pœnam delicti sui sustinuerit, aut in vitium naturale objiciatur, claudus aliquis, luscus, aut gibbosus vocetur veritatem convicii non excusare quo minus animo injuriandi, id factum presumatur, contrarii tamen probationem hic admittendam. Vinn. in In. Just. lib. 4.

would be attended with consequences almost too absurd to mention. Suppose a person to publish, that no overruling providence exists; or that, to break a promise or an oath, is a virtuous act—could the discussion of such questions be tolerated in a court, or brought to issue before a jury? or would proof that indecent transactions have actually occurred, supply any excuse for the public exhibition of them in a print or a pamphlet?

Where, however, an indictment is expressly framed upon the statutes of Scandalum Magnatum, it may be doubted whether the truth would not supply a defence, since the words *false* and *lies*, are used as descriptive of the offence*.

And next, it has been seen, that it is a good defence *to an action*, to shew that the defendant, at the time of publication, gave such a description of the author of the slander and the words he used, as would enable the plaintiff to bring his action. And by the enactments of the statutes concerning Scandalum Magnatum, it appears that no punishment was intended to be inflicted in case the defendant gave up the author of the false tale, and that the imprisonment, even after conviction, was to cease upon the offender's discovering the first mover of slander†.

It does not, however, appear, that such a defence

* See 12 Rep. 133. 2 Mod. 150.

† Vid. supra, 166.

to an indictment at Common Law has been allowed; nor could it, in principle, be admitted*, since the law regards not the truth or falsity of the libel, but only its tendency to provoke to a breach of the peace; and therefore who was the author seems immaterial, provided the matter published possess such a tendency: in case, however, the reporter communicating the slander to the prosecutor, should give up the author, the fact would afford some reason to infer, that the communication was made with a good intention, and did not proceed from malice.

* If a highwayman shall at the gallows arraign the justice of the law, and of those who condemned him, he who publishes this shall not go unpunished. 4 Bract. St. Law, 154. D. L. L. 29.

CHAPTER XXXVII.

Of the Defendant's Act.

THE plaintiff, to entitle himself to damages in a civil action, must, as has been seen, shew a publication made by the defendant, with a wrongful intention; and whatever has been said upon that subject, applies equally to the criminal proceeding, with this addition, that the sending of a *libel* to the individual reflected on, without exposing the contents to a third person, is a sufficient publication to support an indictment, on account of its tendency* to provoke that individual to commit a breach of the peace.

Thus far is clear, that any publication of a libel, with a knowledge† of its contents, is an act which renders the party criminally liable. Upon this branch of the subject, it remains to be inquired, whether the offence may not be completed by some act short of a publication. It may be convenient, for the sake of clearness, first, to consider the different ways in which a man may be instrumental to a libel; and next, how far that instrumen-

Rulata 4 Bsp. 117

* 1 Will. Saun. 132. n. 2. ~~2 Esp. R. 226.~~ 5 Mod. 163. 12 Co. 35. 1 Hob. 62. 215.

† 5 Rep. 125.

tality, in its different degrees, is in a legal view criminal. A person may become instrumental,

1st. By furnishing ideas.

2d. By committing them to paper or print.

3d. By preserving a libel.

4th. By exposing or repeating it.

These seem to comprehend all the varieties of which the case is capable, since a person who procures any of these to be done, is in law considered as the actor; and the copying of a libel falls within the second description. In the fourth case, the acts described amount to an actual publication, of whose criminal nature there is no doubt, and which may, for the present, be considered as out of the question; and with regard to the 1st, a person either suggests the matter to another, for the purpose of committing it to writing, or writes it himself: in the first instance, he may be considered as having published the libel to the writer; if he write it himself, he falls within the 2d description; and, therefore, all the predicaments, exclusive of publication, seem confined to *the committing of libellous matter* to writing, and to *the keeping of such libels in possession.*

It will next be considered how far these acts are criminal.

In the fifth report De Libellis Famosis, the 4th resolution, after describing the different species of libels, immediately proceeds to point out the different modes of publication; and then observes,

"It was resolved in the Star Chamber, in Halliwood's case, that if one find a libel (and would keep himself out of danger), if it be composed against a private man, the finder either may burn it, or presently deliver it to a Magistrate; but if it concern a Magistrate or other public person, the finder ought presently to deliver it to a Magistrate." It does not appear clear, whether this procedure was prescribed as a strictly legal or merely as a moral duty and matter of prudence, since the phrase, "if he would keep himself out of danger," is abundantly ambiguous. This doubt, however, is in some degree removed by reference to the *civil law*, whence the doctrine is said to have been derived; according to which it seems, the finder of a *libellus famosus* was not punishable for the mere keeping of it in possession, but for the improper publication of it.

Si quis famosum libellum sive domi sive in publico vel in quocunque loco ignarus offenderit, aut discerpat priusquam alter inveniat, aut nulli confitetur inventum; nam quicunque obtulerit inventum, certum est ipsum reum ex lege retinendum, nisi prodiderit auctorem; nec evasurum poenas hujusmodi criminibus constitutas, *si proditus fuerit* cuiquam retulisse quod legerit*.

By the edicts of the Emperors Valentinian and Valens;

* Theod. Cod. Lib. 9. tit. 34.

"Si quis famosum libellum ignarus reperiit*, aut corrumpat priusquam alter inveniat, aut nulli confitetur inventum. Si vero non statim easdem chartulas corruperit vel igne consumpserit, sed earum vim manifestaverit, sciat se quod auctorem hujusmodi delicti capitali sententiæ subjugandum." Again in the Codex Justinianus de famosis libellis, "Famosis libellis si quis scripserit quod pertineat ad injuriam alterius†, de quâ est publica accusatio et pœna capitalis, non tantum in auctorem famosi libelli, sed etiam in eum qui invenit nec combussit *sed evulgavit;* quia iste auctor præsumitur esse libelli, qui eum sparsit in vulgus non prodito auctore."

Hence it may be collected, that the finder of a libel was not punishable for the mere keeping of it in custody, but for its subsequent publication; and therefore it seems that the passage in the resolution cited, was intended rather as a caution against the effects of a publication, which a party risked by keeping the libel in possession, than a declaration that the keeping of it in possession was in itself a temporal crime.

With respect to the Star-chamber practice, that Court does not appear to have ever punished for the mere possession of a libel; on the contrary, as will afterwards be noticed, their jurisdiction was

* Cod. lib. 9. tit. 36.

† Ib. tit. 36.

considered as doubtful, even where there had been a publication by sending a libel to the party defamed, — a doubt which never could have been entertained, had the power of that Court to punish for the mere possession been considered as clearly established. But this offence, if it ever existed as such against the law of the country, probably did not survive the Court which created it.

An information* was exhibited against the defendant, for causing to be framed, printed, and published, a scandalous libel. Upon evidence it appeared, that two printed libels had been found at the lodgings of the defendant, upon warrants from the principal Secretary of State to search there. The opinion of the Court was, that this was no crime within the information, though he gave no account how they came there; and that the having a libel in possession without delivering it to a magistrate, was punishable in the Star-chamber only. In the subsequent case of the King v. Beare, Lord Holt, C. J, is reported to have said, that the collecting and transcribing of libels†, for the purpose of publishing them, is criminal, though no publication should ever take place; since men ought not to be allowed to have such evil instruments in their keeping. But in another report of the same case, the defendant having been found guilty of writing and *collecting* cer-

* Vent. 31. E. 21 C. 2. 15 Vin. Ab. 89. pl. 6. Dig. L. L. 19.
† Carth. 409. Holt. R. 422.

tain libels, it was said, that the *collecting* had been better out of the case*; and it is clear that judgment was given on the ground that the defendant wrote the original libel, since though Lord Holt intimated that the bare copying of a libel was criminal, he said there was no necessity for the opinion, because the defendant had been found guilty of writing the original †.

Upon the different reports of this case Ld. Camden remarked: "If all this be law, and I have no right at present to deny it, whenever a favourite libel is published, the whole kingdom in a month or two becomes criminal, and it would be difficult to find one innocent jury amongst so many millions of offenders‡."

With respect to the bare fact of committing libellous matter to print or writing, the nature of the act appears much more doubtful; since though it has been expressly decided, that the bare act of writing, without publication, is criminal at Common Law, the grounds of that determination afford room for doubt.

Under the jurisdiction of the Court of Star-chamber, some publication appears to have been held essential to the completion of the offence; since, even in cases where libels had been sent to the in-

* Salk. 417. Ld. Ray. 414.

† 2 Salk. 419.

‡ 11 St. Tr. 322.

viduals libelled, it was doubted whether the Court had jurisdiction,—a question which never could have been raised, had the mere act of writing been sufficient to complete the offence.

Thus, in the case* of Dr. Edwards and Dr. Wooton, the letter had been written to Dr. Edwards himself, and it was said, that the ~~letter~~ defendant should be punished, (although it was solely writ to the plaintiff without any other publication,) in the Star-chamber, for that it was an offence to the King, and a great motive to revenge. And the same question occurred in the case of Barrow v. Llewellin†, where the letter had been sent sealed to the party, as also in the case of Sir Baptist Hicks‡; and no instance appears, in which the Star-chamber punished for a libel without some publication.

In the case of Lewis Pichering§ in the Star-chamber, the defendant confessed the *publishing* as well as the composing of the libel; and in the resolutions which are subjoined to the case, no hint is given that the mere making of a libel without a publication would be punishable in that Court; on the contrary, the reasons for punishing the offence of libelling are expounded, and are as such as can apply to those cases only in which a libel has been

* 12 Co. 35. 5 J. 1.
† 1 Hob. 62. 13 J. 1.
‡ Hob. 215.
§ 5 Co. 125. 3 J. 1.

actually published: and in the 4th resolution, after the explanation given of the different kinds of libels, the various modes of publication are immediately specified.

In Lamb's case* the bill was exhibited against the defendants for the *publication* of two libels; and it was resolved, that "every one who shall be convicted in the said case, either ought to be a contriver of the libel, or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel;" the resolution then goes on to expound, what shall amount to a publication, and afterwards repeats, that every one who shall be convicted, ought to be the contriver, procurer, or publisher of it, knowing it to be a libel. Upon the face of this resolution it appears doubtful, whether the contriver and procurer were considered as severally punishable for their acts, though no publication should take place; or whether the resolution does not suppose, in the first place, that the offence has been completed by a publication, and then proceeds to define what degree of agency shall render any party concerned responsible for the whole effect produced. In favour of the former construction it appears, that the actors are separately and disjunctively enumerated as liable to be convicted; and this interpretation was adopted by Lord Holt. In support of the latter construction, it

* 9 Rep. 59. 8 J. 1.

may be observed, that the words, "every one who shall be convicted in the said case," refer immediately to the case of the defendants, who were prosecuted for *publishing* two libels; that in the subsequent part of the resolution it is said, "If the defendant write a copy of a libel, and do not publish it to others, it is no publication;" which affords some reason to infer, that a publication was deemed in all cases necessary before any conviction could take place; since the passage, if understood in this sense, that a person who commits a libel to writing is not punishable, unless he afterwards publish it, is sensible and intelligible; but if, on the other hand, the construction be this, that a person who writes a libel, but does not publish it, is not punishable as the publisher, but is nevertheless liable as the contriver, as was contended for in the case King v. Beere,—then the passage is a piece of idle tautology, and amounts to no more than this, that a person, who does not publish a libel which he has written, is not guilty of a publication. The resolution afterwards proceeds to say, "but it is great evidence, that he published it, when he, knowing it to be a libel, writeth a copy of it." Upon which it may be observed, that the resorting to presumptive evidence, by making the act of writing proof of publication, would be nugatory, if that act of itself constituted a distinct and substantive offence.

Samuel Paine, a minister, was tried upon an in-

formation*, setting forth that he was the composer, author, and publisher of a malicious libel against the late Queen Mary, stiled "Her Epitaph." The Jury found, by way of special verdict, that a certain person, to them unknown, did pronounce, dictate, and repeat the words contained in the libel which the defendant did write; and if that will make him guilty of the composing and making of the libel, then they find him guilty, and as to the publication, they find him not guilty. After argument the Court observed, "the making of a libel is an offence, though never published; and if one dictate and another write, both are guilty of making it; to what purpose should any one *write* or *copy* after another, but to shew his approbation of the contents of a libel, and the better to enable him to keep it in his memory, and repeat the contents of it to others." The matter was, however, adjourned, and it does not appear that any judgment was given.

The defendant Beere† was found guilty of *writing* and *collecting*, but acquitted of the making and composing of several libels stated in the indictment. Upon motion in arrest of judgment, Holt C. J. said, "Before I come to the objections

* 5 Mod. 163. 1 Salk. 281. Comb. 358. Carth. 405. 1 Ld. Ray. 729. Holt. 294.

† Ld. Ray. 417. Carth. 409. 12 Mod. 219. 2 Salk. 417.

against the verdict, I shall consider whether it be not criminal to *write* a libel, although a man be not the composer or contriver thereof." The learned Judge observed, that it is the putting of the words into writing, which is the essence of the offence; for the party is not guilty, unless he put the words into writing; and that in all cases where a man does an act, which act causes the thing to be what it is, such an one is to be considered the doer of it; that in all lower offences procurers are principals, so that if A. hold B. whilst C. beats him, A. is guilty of the battery; that Lamb's case was to be expounded by the same case in Moor*, in which it was reported to have been resolved, that the writer of a libel is, in law, the contriver; but that in Lamb's case the question was not concerning the writing or making, but about the publication thereof, and it was held, that the writing of a copy of a libel, as indeed the writing of the original libel itself, is no publication thereof, but only an evidence of publication; that the question was not how far the writing of a libel was criminal, but whether the writing of a copy be a publication, which indeed it is; nay, that the case of John De Northampton is apposite, who was charged with writing only, without any mention made of publication, and who confessed the writing only. The learned Judge also expressed his opinion, that the copying of a libel was

* 813.

a libel, because it comprehends all that is necessary to make it a libel, the same scandalous matter, and the same mischievous consequences; since it is by this means perpetuated, and may come to the hands of other men, and be published after the death of the copier; and that if men might take copies of them with impunity, then the printing of them would be no offence, and then farewell to Government.

Turton and Rokeby, Justices, were of the same opinion, and referred to several cases*, to prove that writing a libel without publishing it, was punishable in the Star-chamber.

The parallel drawn by Lord Holt, in the above case, seems objectionable, since it assumes the offence to have been completed. If A. hold B. whilst C. beats him, A. is guilty of the beating, but the offence, that is, the battery, here is completed; to suppose then, that the case in question analogous to it is to assume that the offence of libelling is complete without a publication; the question was not whether an aider or abettor to an offence actually committed was punishable as a principal, but whether any offence had in fact been consummated, or the whole rested in mere intent and preparation; as if A. had supplied C. with a stick for the purpose of beating B., but no battery had actually taken place.

Neither do the cases relied upon appear applica-

* Hob. 62. 215. 12 Co. 35.

ble: in that of John de Northampton* it is stated that the letter *was written to* John Ferrers, one of the King's counsel; and the confession runs thus: "*Et quia prædictus Johannes cognovit dictam literam per se scriptam Roberto de Ferrers, &c.;*" now if "written to" merely imported the address of the letter, which never passed from the defendant, there was no occasion to confess the writing of it to Robert de Ferrers, and the very same terms "written to" are used by Sir E. Coke, in his 12th Report, to imply a sending as well as writing.

The cases cited by Tutton and Rokeby†, Justices, are inapplicable; since in those instances there was *a publication* of the libel to the party defamed.

Knell‡ was tried upon an information charging him with having printed and published a libel, entitled "Mist's weekly Journal." It was proved that the defendant was a printer's servant, and his business was to prepare the type for printing off, which business was called composing for the press; that the defendant and another composed together the libel in question, taking the alternate columns. For the defendant it was objected, 1. that since the defendant took a distinct part, that which he composed could not bear the construction put upon the

* 3 Ins. 174.

† Hob. 62. 215. 12 Co. 35.

‡ Hil. 3 G. 9. Barnard. K. B. 305. D. L. L. 25.

whole; and 2dly, that since he composed only, he could not be found guilty of the printing wherewith he was charged. It was answered, that in misdemeanors, an accessory in part is a principal in the whole, and, therefore, as the defendant assisted in the composing, a circumstance essential to the printing, he, by that act, made himself concerned in the whole; that composing was taking a copy in types, which would make the defendant a publisher, since it had often been determined that the taking of a copy of a libel was an act of publication. But the Chief Justice directed the Jury to acquit the defendant of the publication, and if they believed the evidence, to find him guilty of the printing, which they did accordingly*.

Upon the whole, whatever doubt may exist as to the criminal nature of the act where it is confined to the mere writing, printing, or preserving of a libel, it seems perfectly clear that every person who maliciously lends his aid to the construction of a libel, subsequently published, or who contributes to the publication of one already made, with a knowledge of its contents, is indictable as a principal for the whole mischief produced.

And according to the doctrine laid down in

* The defendant was afterwards sentenced to stand upon the pillory twice, and to be kept to hard labour in Bridewell for the space of six months. D. L. L. 124. T. Carter was convicted and punished for a similar offence. 9 St. Tr.

Lamb's case*, where a libel has been published, proof that the defendant committed it to writing, or, by parity of reasoning, did any other act contributing to its existence, is great evidence that he published it, unless he can satisfactorily explain the motive of his act.

* 9 Co.

CHAPTER XXXVIII.

Proceedings against Offenders.

THE proceedings against offenders are either summary, as by their immediate apprehension and imprisonment; by attachment, by binding over to the good behaviour; or, in the more usual mode, by information or indictment. The summary process is in general founded upon contemptuous language and reflections applied to those who preside in courts of justice and their proceedings; and such contempts are either direct, where a judge or magistrate is openly insulted in the execution of his office, or consequential, where the offender, by speaking or writing contemptuously of the court, or its judges in their judicial capacity, reflects upon the authority by which they were appointed, and creates a prejudice against the administration of justice. And first, where the insult is offered in the face of the court by the use of contumelious language, demonstrating the want of that respect and regard which is essential to the preservation of its authority, the offender, it is said, may be instantly apprehended,

fined, or imprisoned, at the discretion of the judge, without further examination*.

This doctrine appears to extend to all cases where contemptuous words are spoken in the presence of a magistrate in the actual discharge of his duty. As if a man should say to a justice of the peace in the execution of his office, "You are a rogue† and a liar," or tell the judge of a Court Leet that he is a fool‡, or is forsworn§, or say—"If I cannot have justice here, I will have‖ it elsewhere." And though the judge may elect to proceed in this summary mode; yet, if he does not, the offender is liable to an indictment, since, wherever a justice may commit for a contempt, the party may be indicted for the misdemeanor¶.

Where the contempt is not offered immediately in the face of the court, but consists in insolent comments upon the court or its proceedings, or in the indecent publication of matters still pending, the effect of which may be to create prejudice and partiality, and thereby to hinder the fair administration of justice, the proceeding is by attachment, which

* Cro. Eliz. 78. 2 Roll Ab. 78. 4 Bl. Comm. 286. Stam. P. C. 73. b.

† Str. 420, Ow. 113. Mo. 470. Cro. El. 581.

‡ Cro. Eliz. 78.

§ 2 Roll Ab. 78.

‖ 1 Sid. 144. 1 Keb. 508.

¶ Str. 420.

is a process from a Court of Record, awarded by the justices at their discretion, upon a suggestion, or upon their own knowledge*.

It may be considered here, from what courts, for what words, and upon what suggestions, an attachment issues.

It appears, generally, that an attachment may be granted by any of the superior courts of Westminster Hall against any persons guilty of contempts against them. When a party, not present in court, publishes any contemptuous expressions against the the court or its proceedings, the court will, upon an affidavit of the fact, make a rule upon him to shew cause why an attachment should not be granted against him; and in some cases, where the offence is of a very flagrant nature, will grant an attachment in the first instance.

Upon a rule granted † against the defendant Wiatt, to shew cause why an attachment should not issue against him for publishing a libel on the Court of King's Bench, the defendant shewed by affidavit that his fault was not wilful, but merely through ignorance, that he had the libel from one Crownfield, a printer in Cambridge; that it was in Latin, a language which the defendant did not understand, and that he did not know who was the author, otherwise than by a

* 2 Haw. 213. vid. Wils. 300. † 8 Mod. 123.

letter which he received from the printer, and which was affixed to the affidavit, by which letter it appeared that Dr. Middleton was the author. On this it was moved, that the rule should be discharged; but the rule was continued on the defendant until he made out his allegation against the printer, who was therefore joined in the rule, that both of them might be before the court. In the next term, Dr. Middleton* appeared, and confessed that he was the author of the book; the rule was then discharged against the publisher and printer, and the doctor was committed until further consideration. After a few days confinement he was brought into court, fined £50, and bound to his good behaviour for a year.

A rule† was granted to shew cause why an attachment should not issue against Elizabeth Mayer and Dowling, for publishing a libel on the proceedings of the court in the trial of Lady Lawley. Elizabeth Mayer produced an affidavit, stating, that her husband kept a pamphlet shop, that in his absence Vaughan came to the shop and asked for Lady Lawley's trial, that she did not know that it was in the shop, but searching found it, and refused to sell it to Vaughan, but permitted him to read it. The court said it was beyond all question that attachments had been granted in such cases, and

* Fort. R. 201.

† Mich. 8 G. 2. 1732. 2 Barnard. 43. K. B.

particularly alluded to Dr. Middleton's case. The court in general agreed to discharge the rule as to her, and said they could not make the rule absolute as to Dowling, because there was no affidavit of service.

A rule having been* obtained to shew cause why an information should not be granted, the defendant on being served with the rule shewed his disregard of it in very contemptuous language. Upon a motion for an attachment, grounded upon this contempt, Northey, Attorney-general, insisted that he ought to be first heard to shew cause against it; but the court said, "He shall answer it in custody, for it is to no purpose to serve him with a second rule who has slighted and despised the first; it would be to expose the court to further contempt."

And where the court apprehend that the attachment will be forcibly resisted, they will order the Sheriff of the county† to take with him a force sufficient for its due execution. But it seems that the court will not grant an attachment in‡ the first instance, unless the words be sworn to by two witnesses, since otherwise it would be in the power of one hardy man to hinder another of an opportunity of defending himself before he was deprived of his liberty; and when contemptuous words are

* 1 Salk. 84. † 1 Str. 185.
‡ 1 Str. 185. 3 At. 219. Say. Rep. 114.

spoken of the court, the rule for attachment is granted in the first instance; but where they are spoken of its process, a rule to shew cause* only; and the court will punish for contemptuous words spoken on the delivery of a declaration† in ejectment.

When the party has been brought into court, he is either committed, in order to answer interrogatories, or is permitted to enter into a recognizance with two sureties, in such sum as the court shall direct, to appear and make answer upon oath to such interrogatories‡ as shall be exhibited against him.

And it is said§, that the party cannot confess the contempt and throw himself upon the mercy of the court, except in cases of rescue and of contempts committed in the face of the court. If the party be discharged upon his recognizance‖ to answer interrogatories, and none be exhibited within four days after entering into such recognizance, the court will discharge it upon motion; but if no such motion be made, the court will compel him to answer interrogatories exhibited after the four days. Upon these interrogatories, examinations are taken, and

* Tidd. 428. vid. Str. 185. 1068.

† Str. 567.

‡ Haw. P. C. c. 22. s. 1. Barnard. K. B. 58.

§ 1 Bl. 649. 6. vide 4 Bl. Comm. 284.

‖ Haw. P. C. c. 22. s. 1. 5 T. R. 362.

it is referred to the Master of the Crown Office to make his report; the party* is then either acquitted or adjudged to be in contempt.

If the party, in his answer, purge himself from the charge upon oath, though he is liable to a prosecution for the perjury†, if he has sworn falsely, he must nevertheless be acquitted of the contempt, and his answer cannot‡ be disproved by adverse and contradictory affidavits.

Next, by requiring sureties of the peace, or for the good behaviour of the party.—It seems agreed, that the publication of a libel, does not amount to a breach of the peace, but rests in tendency only.

In Dalton's Justice§, a libel is defined as a thing tending to the breach of the peace; in Sir Baptist Hicks's‖ case, it is called a provocation to a breach of the peace; and in the King¶ v. Summers, it was held to be cognizable before Justices, because it *tended* to a breach of the peace; and in Hawkins's Pleas of the Crown**, and Sir William Blackstone's Commentaries††, a libel in the criminal sense is also defined by its tendency. In the case of the King v. Wilkes, the court of Common Pleas‡‡ gave a decided opinion to the same effect. And L. C. J. Pratt ob-

* B. R. H. 23.
† 6 Mod. 73.
‡ 4 Bl. Comm. 288.
§ 289.
‖ Hob. 224.
¶ Lev. 139.
** c. 73. s. 3.
†† 4 Bl. C. 150.
‡‡ 2 Wils. 150.

served, "I cannot find that a libeller is bound to find surety of the peace in any book whatever, nor ever was in any case but one, viz.—the case of the seven Bishops, where three Judges said, that surety of the peace was required in the case of libel: Judge Powell, the only honest man of the four Judges, dissented; and I am bold to be of his opinion, and to say, that the case is not law. Upon the whole, it is absurd to require surety of the peace in the case of a libeller." And it was held in the above case, that though surety of the peace might be required in the case of libel, it could not exclude the privilege of a member of either House of Parliament, who is intitled to privilege from arrest, in all cases except treason, felony, and actual breach of the peace; and the decision of the court in the proceeding against the seven Bishops, who were committed to the Tower for not entering into recognizances after having published an alleged libel, in their petition to the King, was strongly reprobated. But it has been the practice, from very early times, to require security for the good behaviour from persons publishing contumelious and disrespectful words concerning ministers and officers of justice, and their proceedings.

It appears from the 3d Institute*, that in the reign of Edward the 3d, John de Northampton, an Attorney of the King's Bench, was committed to

* 174.

the custody of the Marshal, for having written a letter reflecting on the conduct of the Justices; and that he afterwards found six mainpernors for his good behaviour.

And it seems that sureties for the good behaviour may be required from any person* who applies contemptuous or disrespectful language to any Judge, Justice of the Peace, Mayor, or other civil Magistrate, though he be not in the actual execution of his duty*, and though the words have no relation to his office.

And that the rule extends to general words of disparagement spoken of such Magistrates in their absence†; but Lord Holt, C. J. intimated, that this ought not to be done by the offended Justice, but by one of his brethren‡. And the same learned Judge, in the Queen v. Langley§, after observing that binding to the good behaviour was sufficient to secure the authority of Mayors, added, that it must be done instantly, according to Dr. Bonham's‖ case. It seems, however, from the general current of decisions upon this point, which

* Cro. El. 78. Salk. 697. Haw. P. C. c. 61. s. 2. 6 Mod. 124. Holt. 654. Str. 420.

† Cro. El. 78. 1 Lev. 52. s. 2. s. 3. 11 Mod. 117. Cro. Eliz. 689. contra.

‡ 12 Mod. 514.

§ 6 Mod. 124.

‖ Stiles. 251.

are very perplexed and contradictory, that the words must either have been spoken in the presence of the Magistrate; or if in his absence, have in some way affected him in his office. In other cases it might not be prudent in a Magistrate to commit for want of sureties, since he does it at his *peril*, the case of commitment must be expressed with certainty upon the face of the warrant*; and in case it should prove insufficient, he would be liable to an action for false imprisonment.

But it seems perfectly clear, that for unmannerly† expressions, used in the face of a Court of Justice, though not applied to the Court or its proceedings, or for words spoken for the purpose of deterring an inferior officer, as a Constable, from the execution‡ of his office, or abusing him whilst discharging his duty, the offender may be bound to to his good behaviour.

With regard to mere rash, quarrelsome, uncivil words, in general, it seems that sureties cannot be demanded from the speaker, unless they either amount to a direct solicitation to break the peace or scandalize the government, by abusing those who are entrusted by it with the administration of justice; or be uttered with intent to deter an offi-

* Per Walmesly, J., Dean's case, Cro. El. 689.
† 1 Lev. 107. 1 Keb. 558.
‡ Haw. P. C. c. 61. s. 2. 3.

cer from the execution of his duty*. It has been already seen, that for a libel in general, sureties for the peace are not demandable; but where a letter contains a direct challenge, the same security for the good behaviour may be required as if the words had been spoken.

It is said, a recognizance to keep the peace may be forfeited by mere words, but they must directly tend to a breach of the peace, as by a challenge to fight in the party's presence†.

* Haw. P. C. c. 61. s. 3. Cro. Car. 498, 499. Cro. El. 286. Pal. 186.

† 4 Burn's Jus. 853.

CHAPTER XXXIX.

Proceeding by Information.

WITH the exception of those cases where a defendant has been guilty of a contempt, no punishment can be inflicted upon him for any malicious publication, unless he shall have been previously convicted of the fact upon the oath of twelve Jurors. There are two modes, by either of which the matter may be subjected to their verdict;—by an information, exhibited in the name of the King, or by the finding of a bill by a Grand Jury.

Note. As to the great antiquity and acknowledged legality of the proceeding by information see the argument of Sir Bartholomew Shower, 1 Show. Rep. 106. 4 Bl. Comm. 305. Whence it appears to have been as ancient as the law itself. To introduce any discussion upon the subject of informations would be inconsistent with the object of this treatise; since, in the first place, informations are, in point of law, no more connected with the subject of libel than they are with any other misdemeanor; and in the second, no doubt can possibly rest upon the legality of a practice which has prevailed for centuries, and been sanctioned by at least two acts of the legislature. 4 and 5 W. and M. c. 18. 43 G. 3. c. 58.

Informations are of two descriptions, they are either filed by the Attorney-general as the immediate officer of the crown, or by the Master of the Crown Office upon the complaint of a private individual. The objects of those informations which are filed by the Attorney-general, are those offences which manifestly tend to excite and produce some great public mischief; but in what cases it may be necessary to call in aid this process is a matter resting in the discretion of that officer, whose duty it is, as the immediate agent of the crown, to bring under the cognizance of the Court all offences and abuses which are of so dangerous a nature as to render immediate attention necessary.

In case of libels this power has been exercised where they tend to subvert religion or morality; to excite discontent against the Constitution, the King, or his Government; to involve the country in foreign wars, or to excite particular classes of people to acts of tumult and outrage; but it has not been usual for the Attorney-general to interfere where the libel has affected a private individual only.

With respect to the other species of information, which are sometimes granted by the Court of King's Bench at the instance of a private person:

These were formerly filed at the suggestion of the applicant by the Master of the Crown Office, and at the discretion of that officer, without any direct

application to the Court; but the practice had put an end to it, 4 & 5 W. & M. c. 18. which enacts that the Clerk of the Crown shall not file any information without an express direction from the Court of King's Bench. It may be proper to adduce a few instances, to shew the general principles by which the Judges of the Court of King's Bench have been guided in the exercise of this branch of their jurisdiction, and to refer to the regulations which they have thought fit to prescribe to relators requesting their interposition.

In the case* of the King v. Staples, an information was granted against the defendant for having published in a newspaper, called the York Journal, that "Richard Thompson, an Alderman of York, and a Justice of the Peace, was scandalously guilty of telling a lie in divers companies, viz. that the said Staples had asked Mr. Thompson pardon for publishing in the same newspaper that he Mr. Thompson was married to one Mrs. W." and upon granting the information, Page J. observed that the applying of such words to a Magistrate was an aggravation.

The defendant Sharpe† published in a newspaper an affidavit of bastardy, which he stated to have been sworn before Sir William Billers, a Magistrate, by a woman, without its having been read by her;

* And. 228. Dig. L. L. 80.

† Andr. 384. the King v. Sharpe.

and the Court on granting the information were of opinion, that the publication of the affidavits was punishable, though no scandalous reflections were made upon the case, especially as they tended highly to defame a Magistrate.

The defendant*, in a conversation about a warrant which had been granted by Mr. Kent, a Justice of the Peace, asked if Mr. Kent was a sworn Justice, and being answered that he was, replied, "If he is a sworn Justice, he is a rogue and a forsworn rogue;" but the Court refused an information; saying, it is not the same insult and contempt as if spoken to him in the execution of his office, which would make it a matter indictable. So where the defendant† said of a Justice of the Peace, "He is an old rogue for sending his warrant to me," the Court refused an information leaving it to the party to proceed by indictment.

Where the libel imputed to a naval‡ commander the want of courage, knowledge, resolution, and veracity; to a peer§, that he acted improperly as President of a Court Martial, and that he had been guilty of perjury, the Court granted informations. The defendant‖ published in a newspaper, entitled

* The King v. Pocock. Str. 1157.

† R. v. Lee. 12. Mod. 514.

‡ Trin. 32. G. 2. the King v. Dr. Smollett.

§ The King v. Philip Thicknesse, Esq. Hil. 3 G. 3. D. L. L. 86.

‖ Tr. 21 Geo. 3. Dig. L. L. 83.

"The Gazetteer," the following libel on the Earl of Clanricarde, whose Countess, to whom he had been some time married, was then living. "Last night the Right Honourable the Earl of Clanricarde was married, at St. Mary's church, to Madame Carolina, a celebrated dancer belonging to the theatre at Smock-alley, and last Saturday they appeared in the boxes at Crow-street Theatre: she had jewels on computed at upwards of £3000." An information was granted. So where the libel* imputed treasonable designs to a nobleman, an information was granted. And the Court will grant informations without regard to the rank† or dignity of the parties traduced, whenever their immediate interference appears necessary for the purposes of justice. The libel complained of charged several Jews, lately arrived from‡ Portugal, with the murder of a Jewish woman and her child, because the father of it was a Christian, and thereby exposed them to the fury of the populace: an information was granted.

An information was exhibited against the defendant Brown for printing and publishing in a newspaper, called "The Royal Chronicle," a libel§ entitled, "An authentic narrative of several particulars relating to the death of Miss Frances Lynes,

* Doug. 387.

† Doug. 387. K. v. Bate.

‡ Bac. Ab. tit. Lib. 494.

§ E. T. 2 Geo. 3. D. L. L. 84.

whose ghost is supposed to have haunted a house in Cock-lane, West Smithfield, for many nights past," tending to traduce and vilify the reputation of one William Kent, and to represent and cause it to be believed, that the said William Kent had, by artful means and circumstances, obtained and procured the last will and testament of the said Frances Lynes, spinster, since deceased, to be made, and unjustly to cause the validity of the said will to be called in question, and also to raise groundless suspicions concerning the death of the said Frances Lynes; and also to cause a false and scandalous report raised and propagated by means of public newspapers, that the spirit or ghost of the said Frances Lynes haunted the house of one Parsons in Cock-lane, to be believed and credited in order to injure and oppress the said William Kent.

Mr. Willy Sutton was tried for the murder of Miss Bell, at the Old Bailey, on which occasion his innocence appeared so clear, that the Jury interfered before the learned Judge, who presided, had begun to sum up the evidence. An information was afterwards granted* against Thomas Holland for writing a libel on Sutton, in a pamphlet entitled "A most circumstantial account of that unfortunate young lady, Miss Bell, otherwise Sharpe."

When a motion† was made for an information

* Dig. L. L. 82. East. 7. 1 G. 3. R. v. Holland.

† The King v. Roberts. Dig. L. L. 89. 2 G. 2. 1729.

against the defendant for publishing reflections upon the African Company in one of the newspapers; by charging them with having supported their trade by treachery and fraud, the Court refused to interfere, considering the matter nothing more than a dispute upon a matter of trade; but the Court granted a rule to shew cause why an information should not be granted for a libel against the New-York Buildings' Company, charging them with raising the value of their stock by getting £100,000 under the credit of their seal.

But it seems, that in general, the imputation must be of a personal and criminal nature to induce the Court to interfere, and that it is not sufficient that it tends to lessen a man† in his trade.

In the case of the King v. Roberts, an information was refused against the defendant‡ for having published in a newspaper, that Ward's pills and drops had done great mischief in twelve different cases, and that they were a compound of poison and antimony.

And in general where there is reason to suppose from the circumstances under which the party published, that the act did not proceed from a mere malicious intention, the Court will not interfere by granting an information.

* 2 Barnard, K. B. 114. R. v. Nutt. D. L. L. 78.

† Andr. 229. 2 Barnard, K. B. 183. Dig. L. L. 90. c. 2. Bac. Ab. 492.

‡ Dig. L. L. 90. Bac. Ab. tit. Lib. 492.

The defendant* advertised, that one Maddox, an apothecary, had personated Dr. Crow, a physician, and taken his fees, and an information was refused, the apothecary not pretending to deny the charge.

When a man advertised in a public newspaper, that his wife had eloped from him, and cautioned all persons against trusting her, an information for a libel being moved for, it was denied, because it was the only way† the husband could take to secure himself.

It was advertised in one of the newspapers‡, that Lady Mordington kept an assembly in Moorfields, upon which Lord Mordington advertised, that the person calling herself Lady Mordington was an impostrix, and that there was no such person, except his wife, who always lived with him. Upon motion for an information it was refused by the Court, since the term impostrix was properly applied to one assuming the title without any right.

So where the imputation is continued in a petition drawn up for the purpose of obtaining redress for an injury, and not with an intention to asperse the the prosecutor, the Court will not grant an infor-

* R. v. Bickerton, Str. 498. R. v. Webster, 3. T. R. 388. Dougl. 270. 371.

† R. v. Enes. Andr. 229. D. L. L. 89.

‡ R. v. Jenneaur, Easter, 8 G. 2. Bac. Ab. tit. Lib. 492.

mation; though the publication impute fraud to the prosecutor, since it is no more than is alleged in every bill in Chancery.

The defendant* complained in a writing, directed to General Wills and the four principal officers of the Guards, in order to be presented to the King, that Captain Carr, after inducing him to part with a warrant for some money due to him from Government, under the pretence of procuring payment for him, received the money, and refused to pay it to the defendant. Upon motion for an information, the Court held that the petition was no libel.

Miss Mary Jerome†, a Quaker, residing at Nottingham, having acted in disobedience to the rules prescribed by the sect of which she was a member, by frequenting places of public diversion, going into mourning for the death of a relation, and by other transgressions of a similar nature, the society, after many fruitless remonstrances and other useless attempts to reclaim her, proceeded at last in the customary way to pronounce the sentence of expulsion, which, having been approved of at a monthly meeting, was afterwards read by the defendant, Francis Hart, as clerk of their meeting. The sentence, after charging Miss Jerome with having imbibed erroneous notions contrary to Scripture doctrine, and having acted in various parts of her

* Andr. 229. 3 Bac. Ab. tit. Lib. 492.

† 2 Burn's Ecclesiastical Law, 779. Dig, L. L. 32.

conduct very inconsistently with a life of self-denial, and of having neglected to attend the meetings for divine worship, and reciting the fruitless attempts of the society to reclaim her from error, and to bring her to the acknowledgment of truth, both in judgment and practice, proceeded to declare her no longer in unity with the society. Miss Jerome, being acquainted with this proceeding, sent her maid-servant to the defendant for a copy of the sentence, which he transcribed and inclosed to her under cover; but upon application to the Court for an information against the defendant, they refused even a rule to shew cause.

Next, as the rules prescribed to those who apply to the Court for leave to file criminal informations. In general the applicant must waive his right of action*; and this is an advantage which the defendant derives from this mode of proceeding; for, if convicted under an indictment, the prosecutor would still be at liberty to bring his action to recover damages. Where, however, the Court, on hearing the whole matter, are of opinion that it is a proper subject for an action, they will give the party leave to bring† it.

The Court‡ will not grant an information, unless the application be made recently after the cause of complaint shall have arisen.

* 2 T. R. 198.
† 2 T. R. 198.
‡ Bac. Ab. tit libel, 492.

The application must be accompanied with affidavits, stating the circumstances of the case: these ought not to be entitled, and if they are, cannot be read; those produced, on shewing cause, may or may not be entitled; but all affidavits after the rule is made absolute, must be entitled.

On a motion for an information against A. an affidavit, in a motion against B., cannot be read, since the person who made it would not be liable to an indictment for perjury, though it should be false†. But in the case of the King v. Joliffe§, a criminal information having been granted against the defendant, he, before the trial at Nisi Prius, distributed hand-bills in the assize town, vindicating his own conduct, and reflecting upon the prosecutor's. This matter being disclosed to the Judge at Nisi Prius, was held a sufficient ground to put off the trial; and that affidavit having been returned to the court of King's Bench, another information was granted on it against the defendant; the affidavit taken at Nisi Prius being considered as taken under the authority of the Court above. The affidavit should set forth the libel, its application, and the fact of publication by the person against whom the information is prayed.

And where the application of the libellous matter is indifferent, the Court has refused to grant the in-

* 1 Str. 704. Andr. 313.

† 6 T. R. 60.

‡ 11 Mod. 141.

§ 4 T. R. 285.

formation, saying, that they required a seeming and apparent application to be made*. A. stated in his affidavit, that B. had brought him a challenge from C., and that B. had refused to make affidavit that C. had sent it; but the Court held this evidence insufficient to grant a rule nisi for a criminal information against† C.

It has frequently‡ been decided, that it is necessary for the party praying an information to produce an exculpatory affidavit, denying the truth of the charge, since though the truth be no ground of justification on indictment for a libel, yet it is a sufficient reason why the Court should not interfere in an extraordinary way. But though the Court, in general, require that the affidavit shall directly§ and pointedly aver the prosecutor's innocence of the charge, the rule admits of some exceptions: as where the party charged is abroad, and then the person making the application in his behalf is expected to go as far in his affidavit as the nature of the case admits of, by swearing to letters or other intelligence within his reach‖.

So, where the charge is general¶, no exculpa-

* Fitzgibb. 57. pl. 7. D. L. L. 97. Bac. Ab. tit. Lib. 493.

† R. v. Willet, 6 T. R. 294.

‡ Str. 498. Andr. 229. 3 Bac. Ab. tit. Lib. 492. Barnard K. B. 13. Doug. 284.

§ R. v. Miles, Doug. 283.

‖ R. v. Bate, Doug. 387.

¶ R. v. Bate, Doug. 387.

tory affidavit is required, since it would be absurd to require a man to swear that he was not a traitor or a thief: neither is it necessary where the party is accused of having used criminal language in Parliament, since by the express provision of the Bill of Rights, what passes there cannot be questioned elsewhere*.

Where a libel stated that the Duke of Athol was held in such general abhorrence in the Isle of Man, that if he should obtain an act, then depending in Parliament, it would occasion† a revolt, the Court held, that no affidavit from the Duke was necessary.

After the rule to shew cause has been granted upon the prosecutor's affidavits, it seems that affidavits in confirmation may be produced; but that a supplementary affidavit, if introductory of new matter, is not admissible: but if the new affidavit be partly confirmatory and partly consist of new matter, the Court will not wholly reject it, but distinguish between‡ what is new and what is confirmatory. Though the affidavits of the relator should be contradicted by those of the defendant, in some circumtances, the Court will nevertheless grant the information, if strong probable ground be laid§.

* 1 W. and M. sess. 2. c. 2. art. 9.

† Doug. 387. in the note.

‡ The King v. Kinaston, 2 Kel. 178. Dig. L. L. 55.

§ Doug. 387.

The defendant* shewed for cause against a rule for an information, that the charge of perjury on which the motion was founded was true; but Sir J. Pratt, C. J. said, "In all cases, informations for libels go, unless you can shew the court some probable cause for them to believe you did not publish it. Now, if you had denied it, it would have signified nothing; for then, affidavit stands against affidavit; therefore, the information shall go, that the fact may be tried." And Fortescue, J. said, "It would be a strange thing, if a man should be allowed to justify when an information is prayed against him, and should not be allowed to justify in the information itself when it is gone."

The prosecutor† founded his application upon an affidavit stating, that the defendant confessed to him the publication of the libel; on the other hand it was shewn, that the defendant never made any such confession, yet, since the fact of publication was not denied, the information was granted.

By a rule E. T. 5 G. 2.—Where a person has obtained a rule nisi for a criminal information, and upon shewing cause, the rule is discharged, the party who‡ made the motion shall pay the costs.

When an information is filed by leave of the Court, it is provided by St. 4 & 5 W. c. 18, that

* The King v. Dormer. Barnard, K. B. 13 Dig. L. L. 77.

† R. v. Sharpe, Andr. 384.

‡ But this has been held discretionary. 2 Rol. 61. pl. 8. Dig. L. L. 97.

where the defendant is acquitted, the Court is authorised to award costs to the defendant, unless the Judge shall, at the trial, certify that there was reasonable cause. But it has been held compulsory on the Court to grant costs to the defendant in case of his acquittal, and no certificate's having been granted. The certificate must be granted at the trial, and it is afterwards too late to inquire whether there was probable cause for the prosecution*.

The process which has been issued in case of libel has been either against the person of the offender or his papers.

1. Against the person.

The defendant†, Derby, having been committed upon the warrant of a Secretary of State, for publishing a seditious libel called the Observator, No. 74, was brought before Chief Justice Parker, by habeas corpus, and by him discharged upon entering into a recognizance to appear on the first day of term. Upon that day the defendant took several exceptions to the commitment, and moved to be discharged, insisting, principally, that the commitment previous to indictment, presentment, and conviction for the offence imputed to him, was illegal and contrary to St. 25. E. 3. c. 4.; but the Court held that he was not entitled to his discharge.

John Wilkes‡ was committed upon a Secretary

* R. v. Woodfall, 2 Str. 1131. Dig. L. L. 98.
† R. v. Derby Fortescue, 140. Dig. L. L. 31.
‡ 2 Wilson, 159.

of State's warrant for writing a seditious libel, entitled "The North Briton," No. 45. He was afterwards brought up by habeas corpus into the Court of Common Pleas, and being* privileged as a member of the House of Commons, was discharged without bail.

In the above case† the Court considered the warrant of a Secretary of State to be of the same force with that of a Justice of the Peace, and that neither a Secretary nor Justice ought to issue a warrant upon his own private knowledge; but that it was unnecessary to state upon the face of the warrant the evidence upon which it was granted, or even to state in the warrant that it was granted upon any charge made. And in the same case it was held, that the words contained in the warrant "for being the author and publisher of a most infamous and seditious libel, entitled "The North Briton," was a sufficient description of the offence, since it was known specifically by that name.

* But, by the resolutions of both Houses of Parliament it has been decided, that privilege does not lie in the case of a seditious libel. See Dig. L. L. 54. And the House of Commons has committed one of its members for publishing reflections upon that assembly. Since the privilege of members of Parliament from arrest is not materially connected with the law of libel, the reader is referred, on that subject, to the arguments used by the counsel for the seven Bishops, St. Tr. 4 J. 2. and the case of the King v. Wilkes, D. L. L. 43.

† See Dig. L. L. 51.

In Leach's case* the warrant from the Secretary of State was couched in the following terms: "These are, in his Majesty's name, to authorise and require you (the messengers) taking a constable to your assistance, to make a strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled The North Britain, No. 45, and them, or any of them, having found, to apprehend and seize, together with their papers, and bring in safe custody before me, to be examined concerning the premises, and further dealt with according to law." The messengers, under this warrant, seized Mr. Leach and imprisoned him for some time; but on its being found that he was neither author, printer, nor publisher, he was discharged by the Earl of Egremont's order, without even having appeared before him. After a verdict for the plaintiff the defendants carried the matter, by a bill of exceptions, to the court of King's Bench, when the single point decided was, that the defendants could not justify, inasmuch as they had not acted in obedience to the warrant†.

It is enacted by 43 G. 3. c. 58. s. 1.—"That whenever any person is charged with any offence for which he may be prosecuted by indictment or in-

* 11 St. Tr. 307.

† By a resolution of the House of Commons it was declared, that general warrants in the case of libel are illegal. Journ. Comm. 22 Ap. 1766. And such were, by a subsequent resolution, declared to be illegal in all cases. Ib. 25 Ap. 1766.

formation in the King's Bench (not being treason or felony), and the same shall be made to appear to any Judge of the same by affidavit or by certificate of the indictment or information being filed against such person in the said court for such offence, such Judge may issue his warrant under his hand and seal, and thereby cause such person to be apprehended and brought before him or some other Judge of the same court, or before some one Justice of the Peace, in order to his being bound, with two sureties, as the said warrant shall express, with condition to appear in the said court at the time mentioned in the said warrant, and to answer all and singular indictments or informations for any such offence; and if he shall neglect or refuse to become so bound, such Judge or Justice may respectively commit him to the common gaol of the county, city, or place, where the offence shall have been committed, or where he shall have been apprehended, there to remain until he shall become bound as aforesaid, or be discharged by order of the said court, in term time, or by one of the Judges of the said court, in vacation; and the recognizance to be thereupon taken shall be returned and filed in the said court, and shall continue in force until such person shall have been acquitted of such offence, or in case of conviction, shall have received judgment for the same, unless sooner declared by the said court to be discharged." And the same act further provides, "That in case any defendant

be committed, either by virtue of such warrant, or by virtue of any writ of capias ad respondendum, for want of bail, a copy of the indictment or information shall be delivered to him or to his gaoler, with notice that unless he shall within eight days enter an appearance, plea, or demurrer, to such indictment or information, an appearance and the plea of not guilty will be entered in his name; and that if such defendant shall neglect for eight days to enter an appearance, and to plead or demur, the prosecutor may, on affidavit of the service of the copy and notice, enter an appearance and the plea of not guilty, and proceed in the usual course: and that, upon acquittal, the Judge before whom the trial is had (though not a Judge of the King's Bench) may order such defendant to be discharged out of custody as to his aforesaid commitment."

With respect to the seizure of papers, it is said to have been resolved by all the Judges, that where persons *write*, print, or sell any pamphlet, scandalizing the public or private persons, such books may be seized, and the person punished by law*.

The practice of issuing a general warrant to seize the papers of a suspected person, appears to have been frequently resorted to, in former times, with great abuse, of which the case of Lord Coke himself furnishes an instance; whose papers were seized and carried to the Secretary's office,

* 4 Read. St. Law. 154.

with some valuable securities, which were never returned to him*. Insignificant however is a loss of such a nature when compared with the more serious evils incident to such a procedure, the grievous invasion of domestic peace and security, and the facility with which a person might be made responsible for the contents of writings never in his possession, or deprived of those necessary for the purpose of his defence.

A warrant† was issued in the name of the Duke of Newcastle, one of the Secretaries of State, directed to two of the King's messengers, requiring them, taking a constable, to make a diligent search in the house of Dr. Earbury, the author of a treasonable paper, entitled "The Royal Oak Journal," for all papers of whatsoever kind in his custody, and to bring the said papers before him; the messengers, without taking a constable to their assistance, entered the defendant's house, seized his papers and brought them before Mr. De La Faye, who was the Duke's Secretary and a Justice of the Peace.

The defendant afterwards applied to the Court of King's Bench to have his papers restored to him, insisting that a Secretary of State could not legally grant a warrant to seize a person's papers. Lord C. J. Hardwicke said, that as to seizing the defendant's papers he would not give any opinion whether it was legal or not, that the Court of King's Bench could not grant a rule upon the messenger

* Dig. L. L. 33.

† 2 Barnard. K. B. 346. Dig. L. L. 33.

who did seize them to restore them, and therefore that the question was not properly before the Court for their determination.

But in the great case* of the seizure of papers, it was decided, that a Secretary's warrant to search for papers was illegal; and Ld. Cambden, C. J. observed, "If this point should be determined in favour of the jurisdiction, the secret cabinets and bureaus of every subject in the kingdom will be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall think fit to charge or even suspect a person to be the author, printer, or publisher of a seditious libel. This power so assumed by a Secretary of State, is an execution upon all the parties' papers in the first instance; his house is rifled—his most valuable secrets wrested out of his possession, before the paper, for which he is charged, be found criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper. This power of the Secretary is not supported by one single citation from any law book extant—it is claimed by no Magistrate in the kingdom but himself. Papers are the owner's goods and chattles,—they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot, by the law of England, be guilty of a trea-

* Entick v. Carrington and others, 11 St. Tr. 317.

pass, yet where private papers are removed and carried away, the secret nature of the goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any Magistrate such a power? I can safely say, there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal, which would be subversive of all the comforts of society."

"There is no authority to shew that libels might be seized, except the opinion of the twelve Judges, at the close of the reign of C. II., who gave it as their opinion, that no one could legally expose to the public any thing that concerned the affairs of the public, without licence from the King. This was quoted by C. J. Scroggs, on the trial of Harris for a libel, who extended the doctrine to the seizure of all books, pamphlets, and writings, on matters of public concern."

And again, "It is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some case had been shewn where the law forceth evidence out of the owner's custody by process."

"In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and housebreaking, to say nothing of forgery and perjury, that are more atrocious than libelling; but our law has provided no paper search upon those occasions to

help forward the conviction. Whether this proceedeth from the gentleness of the law, or from the consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say."

"Observe the wisdom as well as the mercy of the law. The strongest evidence before trial, being only *ex parte*, is but suspicion,—it is not proof: weaker evidence is a ground of suspicion, though in a lower degree; and if suspicion at large should be a ground of search, especially in case of libels, whose house would be safe? Upon the whole, we are of opinion, that the warrant to seize and carry away the parties' papers in case of a seditious libel, is illegal and void."

And the House of Commons* afterwards came to a resolution, declaring the seizure of papers, in the case of libel, to be illegal.

Since a criminal proceeding is in its nature local, the offence must be laid and proved to have been committed in the county within which the bill† is preferred. And the indictment may be tried at the quarter sessions, before the Justices of the Peace, as well as before the Justices of Oyer and Terminer‡.

With respect to the technical mode of framing an

* Jour. Comm. 25th April, 1766.

† 4 Read. St. Law. 155. 8 Mod. 328. Dig. L. L. 97.

‡ 2 Haw. c. 8. s. 88. R. v. Summers. 1 Lev. 139.

information or indictment, little remains to be added to the observations already made on the subject of the* declaration. It has been decided, that it is unnecessary to aver the offence to have been committed with "force and arms," since† the publishing of a libel is not a breach of the peace, but only tends to the breaking of it.

Neither is it necessary to allege that the matter published is false, since the averment need‡ not be proved; but the word malitiosè§, or at least some equivalent epithet, has been held essential.

An indictment‖ stating that the defendant "scripsit, fecit, et publicavit, seu scribi fecit, et publicari causavit," has been held too uncertain.

The most usual plea in an indictment or information, is the general issue of *not guilty*, by which the defendant puts himself generally upon the country for his deliverance, and is entitled to take advantage of every defect in the evidence for the prosecution; or to rebut that evidence by counter proof, tending to convince the jury, either that the act imputed was not committed; or allowing the publication, to shew from the context¶, or other circumstances, either that the matter published was

* Vide supra, ch. 19, 20.

† 7 T. R. 4.

‡ Ib.

§ Sty. 392. per Roll. C. J. 1 Vin. Ab. 533. pl. 3.

‖ 8 Mod. 328.

¶ R. v. Lambert and Perry, 2 Camp. N. P. 398.

not criminal in its nature; or if criminal, that it was published inadvertently*, and without any guilty knowledge†.

* R. v. Lord Abingdon, 1 Esp. 226.

† In the case of the King v. Holt, 5 T. R. 444. Lord Kenyon, C. J. observed, if the defendant could have shewn that he had published the paper in question without knowing its contents, as that he could not read, and was not informed of its tendency till afterwards, that argument might have been pressed upon the Jury.

CHAPTER XL.

Of the Trial and its Incidents.

THE offence of the defendant, as stated upon the record, is compounded of four ingredients,

1. The naked overt act, by which he was instrumental to the existence or publication of the libel.

2. The sense in which he published the libel, as pointed out by the proper averments.

3. The tendency of the matter published, when thus understood, to create public mischief.

4. The criminal intention with which he acted, including a guilty knowledge of the contents of the alleged libel.

The two first of these are mere matters of fact, which have ever been considered as appertaining to the decision of a jury, conformably with the maxim, "Ad quæstionem facti respondent juratores, ad quæstionem juris respondent judices."

But with respect to the tendency of the publication and the intention of the publisher, a remarkable doubt has prevailed, whether their consideration ought not to be abstracted from a jury and reserved exclusively for the attention and decision of the Court.

Before the history of the question is briefly

sketched, it may be proper to suggest by what peculiarity in the subject matter it was raised.

The essence of a libel consists in its *tendency* to produce mischief, without regard to any mischief actually produced: when, therefore, the act of publication, and sense and meaning of a libel have been once established, its illegality, that is, its tendency, appears on the record, and requires no further aid from evidence. But the intrinsic illegality is not a mere question of law, since it consists in tendency, which cannot depend wholly upon authority and precedent, but partly, at least, upon extrinsic circumstances, the temper of the public mind, and the passing events of the day. Nor is the intrinsic illegality a mere question of fact; if, indeed, the criminality were required to be ascertained by some visible effect, as the production of a riot, no doubt could exist, and a jury must determine the question of libel or no libel, by inquiring into the existence of the visible test; but resting in mere tendency, it cannot be decided by the mere aid of that kind of evidence upon their credence to which a jury in general pronounce their verdict. The question, therefore, nakedly considered, and without reference to authorities, is ambiguous in its nature, depending for its solution upon a sound judgment and discretion applied to the alleged libel and the temper and circumstances of society, rather than upon a profound knowledge of law on the one hand, or the assistance of evidence on the other.

After the abolition of the Star-chamber, which in

case of libel exercised an unbounded controul over both law and fact, the cognizance of such offences reverted to the court of King's Bench, to be exercised in the constitutional mode by the intervention of a jury; and till some time after this period, no doubt seems to have been entertained of the right of a jury to give a general verdict in the case of libel, as well as in any other criminal proceeding.

In the year 1670*, two Quakers, Penn and Mead, indicted for seditiously preaching to a multitude tumultuously assembled in Gracechurch-street, were tried before the Recorder of London, who told the Jury, that they had nothing to do but to find whether the defendants had preached or not; for that, whether the matter or the intention of their preaching was seditious, were questions of law but not of fact, which they were to keep to at their peril. The Jury first found Penn guilty of speaking to the people in Gracechurch-street. This verdict having been refused by the Recorder, the Jury again retired, and afterwards brought in a general verdict of acquittal; this the Court considered as a contempt, and set a fine of forty marks on each of them, and directed them to be confined till the fine should be paid. Edward Bushel, one of the jurors, refused to pay the fine, and being imprisoned in consequence of his refusal, sued out his writ of habeas corpus, which was returned, together with the cause of his commitment, "his acquittal of Penn

* Bushel's case, Vaughan. Rep. 135.

and Mead against the law of England, against the evidence, and against the direction of the Court on matter of law."

Lord Chief Justice Vaughan, on the latter part of the return, observed, "The words, that the Jury did acquit, against the direction of the Court in matter of law, literally taken and *de plano*, are insignificant and unintelligible; for no issue can be joined of matter in law, no Jury can be charged with matter in law barely, no evidence ever was or can be given to a Jury of what is law or not, nor no such oath can be given to or taken by a Jury to try matter in law, nor no attaint can lie for such a false oath.

"Therefore we must take off this veil and colour of words, which make a shew of being something, and in truth are nothing.

"If the meaning of these words, finding against the direction of the Court in matter of law, be, that the Judge having heard the evidence given in Court, for he knows no other, shall tell the Jury upon this evidence, the law is for the plaintiff or for the defendant, and you are under the pain of fine and imprisonment to find the contrary, then the Jury ought of duty so to do, every man sees that the Jury is but a troublesome delay, great charge, and of no use in determining right and wrong; and, therefore, the trials by them may better be abolished than continued, which were a strange new found conclusion, after a trial so celebrated for many hundreds of years.

"For if the Judge, from the evidence, shall by his own judgment first resolve upon any trial what the fact is, so knowing the fact shall then resolve what the law is, and order* the Jury severally to find accordingly, what either necessary or convenient use can be fancied of Juries, or to continue trials by them at all."

Upon the trial of Nathaniel Thompson† and others for composing and publishing libellous remarks upon the administration of justice, the Chief Justice‡ concluded his observations to the Jury, by saying—"Gentlemen, I do leave it to you, whether upon this evidence you do not believe them all to be guilty of this design of traducing the justice of the nation."

In the case of the Seven§ Bishops, who were indicted for having offered a petition to the King, which was alleged to be a libel, the Judges who seemed no ways inclined to favour the defendants, would not accede to the doctrine of the Counsel for the Crown, who contended that the malice and sedition, wherewith the prelates were charged, arose by construction of law out of the fact, and that the Jury had nothing to concern themselves with but the fact of the publication in Middlesex.

* Bushell's case, Vaughan. Rep. 135.

† 3 St. Tr. 37. The object of the publication was to prove that Green, Berry, and Hill, had been improperly convicted of the murder of Sir Edmondbury Godfrey.

‡ Sir Francis Pemberton.

§ St. Tr. 4 J. 2.

The defendants had given in evidence several parliamentary documents, to prove that the dispensing power claimed by the King, and against the exercise of which the petition of the Bishops was directed, was illegal. The then Attorney-general, after some slight remarks upon this evidence, was about to conclude with a somewhat flippant expression of regret, that the defendants' counsel had spent their time to so little purpose, when the Chief Justice observed, "Yes, Mr. Attorney, I'll tell you what they offer, which it will lie on you to give an answer to,—they would have you shew how this has disturbed the Government or diminished the King's authority." The Attorney-general then contended, that malice or sedition arise by construction of law out of the fact; and that if the thing be illegal, the law says it is seditious, and a man shall not come and say he meant no harm by it.

And afterwards whilst the Solicitor-general was speaking, the Chief Justice interrupted him, by requesting him to come to the business before them, and to shew that the alleged libel was in diminution of the King's prerogative, or that he ever had such a prerogative.

Upon summing up to the Jury, the Chief Justice, after addressing the Jury upon the point of publication, proceeded, "If you believe this was the petition they presented to the king, then we must inquire whether this be a libel." The Chief Jus-

tice then proceeded to intimate his opinion, that the publication in question was a libel, but as it was a point of *law*, invited his brethren to give their opinions.

This the other Judges proceeded to do.

Justice Holloway concluded by saying, "I cannot think it is a libel; it is left to you, Gentlemen, but that is my opinion."

Powell J. also delivered his opinion to the same effect, leaving the issue to the conscience of the Jury.

And afterwards when the Jury retired to determine upon their verdict, they were permitted to take with them the alleged libel.

Upon the trial of John Tutchin*, upon an information for publishing a libel entitled the *Observator*, Lord Holt C. J., after reading the printed papers alleged to be libels, told the Jury, "Now you are to consider, whether these words I have read to you do not tend to beget an ill opinion of the administration of the Government." The learned Judge, it is true, concluded his address, as was afterwards observed by Lord Mansfield C. J., by saying, "If you are satisfied that he is guilty of composing and publishing these papers in London, you are to find him guilty." But these words have immediate reference to the ground of defence upon which Mr. Tutchin's counsel meant to rely; namely, that the

* 4 St. Tr. 659.

offence had not been proved to have been committed in London, and cannot be considered as used for the purpose of withdrawing the attention of the Jury from the quality of the publication, upon which they had just before received instructions; and indeed to suppose it had so meant would prove too much, since if so, the Jury were directed not to find the truth of the innuendos.

The first instance which appears where the Court directed the Jury to find the defendant guilty, if they were satisfied with the evidence of publication, appears to be that of the King v. Clerk* for publishing Mist's Weekly Journal. It appeared upon evidence, that the defendant acted merely as servant to a printer, that his business was to clap down the press, and there was little or no proof of a guilty knowledge of the contents of the paper, or of his being concerned in a criminal act. It was objected by Serjeant Hawkins, that the charge of a malicious and traitorous design was not supported by the evidence, from which it appeared that the defendant acted ignorantly and in obedience to his master's directions. But it was answered, that since the defendant was merely charged with the publishing a seditious libel, the malice was immaterial; and Lord Raymond, Chief J. informed the Jury, that the fact of printing and publishing only was in issue.

And the same learned Judge, upon the trial of

* 2 G. 2. 1729. Barnard. K. B. 304.

an information*, directed the Jury, "that there were three points for consideration: the fact of publication, the meaning, (these two for the Jury) the question of law or criminality for the Court upon the record."

Lord Chief Justice Lee gave the same direction in the King v. Owen†, and Lord Chief Justice Ryder followed his example in the case of the King v. Nutt‡.

Lord Mansfield, soon after his appointment to the high office of Chief Justice, laid down§ the same doctrine in the case of the King v. Shebbeare; and though the same learned Judge repeated the same directions in a number of similar cases, all disquisition upon the province of the Jury on these points seems to have slept, till the verdict given in the case of the King v. Woodfall||. That was the case of an information filed by the Attorney-general for publishing a seditious libel signed *Junius*; the Jury found him guilty of the printing and publishing ONLY.

Upon motion to arrest the judgment, it was insisted upon for the defendant, that a criminal intention is the essence of the offence; and that since they had not found malice, it must be taken not to have existed, since a verdict could not be supplied by inference; but that at all events the verdict was

* 9 St. Tr. 255.

† 10 St. Tr. App. 196. 2, 5 G. 2. K. B. MSS. Dig. LL. 67.

‡ Per Lord Mansfield, 3 T. R. 430 in the notes.

§ Ib. || 5 Burr. 2661.

imperfect, and that there should be a new trial. For the Crown it was argued, that the law would collect the intention from the libel itself, that the printing and publishing were all the Jury had to inquire about, and that the intention might be collected from the libel itself.

Lord Mansfield, C. J. in delivering the judgment of the Court, observed, "there may be cases where the fact proved as a publication may be justified, or excused as lawful or innocent; for no fact which is not criminal, in case the paper be a libel, can amount to a publication, of which the defendant ought to be found guilty. But no question of that kind arose in this case, therefore I directed the Jury to consider whether all the innuendos, and all the applications to matters and persons, made by the information, were in their judgments the true meaning of the paper; if they thought otherwise, they should acquit the defendant, but if they agreed with the information, and believed the evidence as to the publication, they should find him guilty." The learned Judge then proceeded to observe, that if proof of the express intent of the defendant were requisite, the direction was wrong; but that, whether the paper was in law a libel, was a question of law upon the face of the record; and that the epithets in the information were formal inferences of law from the printing and publishing. That the verdict finds only what the law infers from the fact; that where an act, in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found; but where the act

is in itself unlawful, the proof of justification lies upon the defendant, and in failure thereof the law implies a criminal intent."

Having thus declared his opinion upon the subject of libel, in the propriety of which his brethren agreed with him, Lord Mansfield then proceeded to deliver the sense of the Court upon the verdict before them; the substance of which was, that as a doubt had arisen from the introduction of the ambiguous and unusual word *only* into the verdict, there should be a *venire de novo**.

The legality of the doctrines laid down by Lord Mansfield in Woodfall's case, appears to have been expressly decided upon by the Court of King's Bench, for the first time, in the case of the King against† Wm. Davies Shipley, Dean of St. Asaph. The defendant was tried before Mr. J. Buller, at‡ Shrewsbury, upon an indictment, charging him with having published a malicious, seditious, and scandalous libel, entitled, "The Principles of Government, in a Dialogue between a Gentleman and a Farmer," with intent to incite the King's subjects to attempt, by force and violence, to make alterations in the government, state, and constitution of the kingdom. The fact of publication was clearly proved; and of the truth of the innuendos there was no doubt, since they merely averred, that by the letter G., was

* Woodfall's case. 5 Burr. 2661.

† 3 T. R. 428. in the notes, see also Ridgway's speeches of the Hon. Thomas Erskine, vol. 1.

‡ Aug. 6th, 1784.

meant gentleman; by F., farmer; by the King, the King of Great Britain. One witness for the defendant stated, that upon his informing him, that some gentlemen were of opinion the publication might do harm, the defendant answered, he should be sorry to publish any thing that tended to sedition; that some time after, he said, upon reading it at a public meeting, "I am now called upon to shew that it is not seditious, but I read it with a rope about my neck;" and that upon another occasion* when he had read it, he gave his opinion *that it was not quite so bad.*

The learned Judge, on summing up the Jury, declared, that it was not for him to say whether the pamphlet was or was not a libel; and concluded his address to them in these words: "If you are satisfied that the defendant did publish this pamphlet, and are satisfied as to the truth of the innuendos, in point of law, you ought to find him guilty; if you think they are not true, you will acquit him." The Jury brought in their verdict "guilty of publishing ONLY." The learned Judge then informed them, that by such a verdict they would negative the meaning of the innuendos, but that if they left out the word *only*, the question of law would be open upon the record, and that the defendant might move in arrest of judgment. Upon this direction, Mr. Erskine (the defendant's counsel) said, "I beg to ask your Lordship this question, whether, if the Jury find him guilty of publishing, leav-

* Ridgway's speeches of the Hon. Thomas Erskine.

ing out the word *only*, and if the judgment be not arrested by the court of King's Bench, the sedition will not stand recorded ?"

Mr. J. Buller. "No, it will not; unless the pamphlet be a libel in point of law." The Jury then returned their verdict, "Guilty of publishing, but whether a libel or not we do not find."

Upon a motion for a new trial, on the ground of a misdirection by Mr. Justice Buller, the Counsel for the defendant urged five distinct points—

1. That in every criminal case, upon a plea of not guilty, the Jury are charged generally with the defendant's deliverance from that crime, and not specially from any single fact. Upon this topic it was urged, that the rules of pleading in civil cases were framed for the purpose of preserving the jurisdiction of the Court and Jury distinct, by a separation of the law from the fact; but that in criminal cases, no such boundary was ever attempted;—that on the contrary, it had been the custom, from the time of the Norman conquest, for the defendant to throw himself upon his country for deliverance, upon the general issue of not guilty, and to receive from the verdict of the Jury a complete, general, and conclusive deliverance.

In support of this doctrine, the opinions of Sir Wm. Blackstone, Sir M. Hale, Sir Mich. Foster*, and Lord Raymond, were† referred to, and thence assuming that the jury had a right to give a general verdict, it was contended, that to enable them to do so,

* Foster 256. † 2 Lord Ray. 1494.

it was the duty of the Judge to direct them upon the law; and that having omitted so to direct them, and having informed the Jury, that neither the illegality of the paper, nor the intention of the defendant, were within their jurisdiction, the defendant had, in fact, been found guilty without any investigation of his guilt, and without any power left to the Jury to take cognizance of his innocence.

That 2dly. No act is in itself a crime, as abstracted from the malicious intention of the actor, the establishment of the fact being nothing more than evidence of the crime, and not the crime itself, unless the Jury render it so by referring it voluntarily to the Court by special verdict. That in every case, a general verdict, which is as comprehensive as the issue, unavoidably involves a question of law as well as fact, and therefore that a Judge who means to direct a Jury to find generally against a defendant, must leave to their consideration every thing which goes to the constitution of that general verdict, and to direct them how to form that general conclusion of guilty, which is compounded of both law and fact.

That the verdict must be taken to be either general or special; if general, it had been found without a co-extensive examination—if special, the term guilty could have no place in it: that the term guilty was either operative and essential, or a mere epithet of form; if essential, then a conclusion of criminal intention had been obtained from the Jury

without permitting them to exercise their judgment on the defendant's evidence—if formal, no judgment could be founded on it.

3dly. That the circumstance of the libel's appearing upon the record did not distinguish it from other criminal cases. For first, the whole charge does not always appear upon the record; since a part of a publication may be indicted, and may, when separated from the context, bear a criminal construction; and since the Court is circumscribed by what appears upon the record, the defendant could neither demur to the indictment nor arrest the judgment after a verdict of guilty. That the defendant is equally shut out (by the doctrine insisted on) from deriving any aid from context, in his defence before a Jury, for though he should read the explanatory context in evidence, he can derive no advantage from reading it, if the Jury are bound to find him guilty of publishing the matter contained in the indictment, however its innocence may be established by a view of the whole work; that the only operation of the context, is to shew the matter upon record not to be libellous, from the consideration of which, as being matter of law for the consideration of the court, they are excluded: that to allow the Jury to go into the context, in order to form a correct judgment of the part indicted, is a palpable admission of their right to judge of the merits of the paper and the intention

of its author; and that it would be preposterous to say that the Jury have a right to decide a paper criminal as far as appears upon the record, to be legal, when explained by the whole work, of which it is a part; but that they have no right to say, that the whole work, if it happen to be set out on the record, is innocent and legal.

That it is equally absurd to contend that the intention of the publisher may be shewn as a fact by the evidence of any extrinsic circumstances—such as the context; and in the same breath to say that it is an inference of law from the act of publication which the Jury cannot exclude. That the consequences of such a doctrine would be most dangerous, since, if a seditious intention could be inferred from publishing any paper, charged to be a libel, a treasonable intention might with equal reason be inferred from publishing a paper charged to be an overt act of treason.

4thly. That a seditious libel contains no matter of law; for the Court, in considering the question of a libel, as it appears upon the record, are circumscribed in forming their judgment, and can derive no assistance from extrinsic circumstances; since, if they were to break through their legal fetters, their judgment would be founded in facts, not in evidence: but that such objections would vanish if the seditious tendency be considered as a question of fact, since the Jury can examine, by evidence,

all those circumstances, which establish the seditious tendency of the paper, from which the Court are shut out.

5thly. That in all cases when the mischievous intention, which is the essence of the crime, cannot be collected by simple inference from the fact charged, because the defendant goes into evidence to rebut such inference, the intention becomes a pure unmixed question of fact for the consideration of the Jury. That "the publication* of that which is unlawful is but evidence of a criminal intent;" but that in the principal case evidence had been offered in favour of the defendant, though by the learned Judge's directions to the Jury, the whole of it had been removed from their consideration. That in Lamb's† case it was laid down, that every one who should be convicted of a libel must be the writer, contriver, or malicious publisher, knowing it to be a libel; that the knowledge there meant was not a mere knowledge of the contents, for that would make criminality depend upon the consciousness of an act, and not on the knowledge of its quality, which would involve lunatics and children in all the penalties of criminal law.

Lord Mansfield, C. J. in delivering the judgment of the Court, observed, "Four objections

* Lord Mansfield's doctrine in the cases of Woodfall and Almon. 5 Burr. 2661. 2686.

† 9 Co. 59.

have been made; the first is peculiar to this case, namely, that evidence of a lawful excuse or justification was not left to the jury as a ground of acquittal. Upon every such defence there arise two questions—the one of law, the other of fact. Whether the fact alleged (supposing it true) be a lawful excuse, is a question of law: whether the allegation be true, is a question of fact; and according to this distinction, the Judge ought to direct and the Jury ought to follow his direction; though by means of a general verdict they are entrusted with the power of confounding the law and fact, and of following the prejudices of their affections and passions."

The learned Judge then proceeded to comment upon the evidence offered by the defendant, which the Court considered as rather aggravating his conduct than supplying a ground of defence to be left to the Jury. His Lordship then observed, "The second objection is, that the Judge did not give his own opinion whether the writing was a libel, or seditious or criminal. The third, that the Judge told the Jury that they ought to leave the question upon the record to the Court, if they had no doubt of the meaning and publication." That the answer to these objections is, that, by the constitution, the Jury ought not to decide the question of law, whether such a writing of such a meaning, published without a lawful excuse, be criminal, and that they cannot decide it *against*

the defendant; because, after a verdict, it remains open upon the record. That this is peculiar to the form of a prosecution for libel, that the question of law remains open for the Court on the record, and that the Jury cannot decide it against the defendant; so that a general verdict that the defendant is guilty is equivalent to a special verdict in other cases.

That no case had been cited of a special verdict in a prosecution for libel, leaving the question of law upon the record to the Court. That a criminal intent, from doing a thing in itself criminal without a lawful excuse, is an inference of law. That the practice objected to had continued ever since the revolution without opposition. That the fundamental definition of trials by Jury, depends upon an universal maxim without an exception, *Ad quæstionem facti respondent juratores, ad quæstionem juris respondent judices;* that where the questions can by the form of pleading be separated the distinction is preserved upon the face of the record; but that when by the form of pleading the two questions are blended together, and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the Jury. His Lordship concluded by giving the judgment of the Court, that the rule for a new trial should be discharged*.

Lord Kenyon, C. J. adopted Lord Mansfield's doctrine in summing up to the Jury in the

* Mr. Erskine afterwards moved in arrest of judgment, and judgment was arrested, the Court considering the indictment to be defective.

in the case of the King v. Withers*. As a matter of speculative curiosity, it is most singular, that the determination of the four points of which the guilt of a libeller is compounded should have afforded room for so complicated an argument in so advanced a period of English jurisprudence; the case comprehends no more difficult elements than matters of construction and of intention, questions by no means peculiar to the case of libel, but forming ingredients in other criminal charges, though under different modifications.

The circumstance of this discussion is the more curious from the consideration that the contending parties agreed upon all the points which may be considered as essential to the theoretical and abstract justice of the case, and differed only as to the means and process by which the ends of justice might be best accomplished, it being on all parts admitted that a mischievous tendency in the thing published, and a criminal intent in the publisher, were necessary to the existence of the crime.

After this brief review of the principal decisions upon this interesting topic, little remains, but to quote the terms used by the legislature, when Parliament deemed it proper to interfere and remove all doubt from this important subject.

In the Statute 32 George III. c. 60. it is recited, that doubts had arisen, whether, on the

* 3 T. R. 428.

trial of an indictment or information for the making or publishing any libel, when an issue or issues are joined between the King and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the Jury impannelled to try the same to give their verdict upon the whole matter in issue; and it is then *declared* and *enacted* that on every such trial the Jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put to issue upon such indictment or information, and shall not be required or directed by the Court before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information. By the second section it is provided, "that on every such trial the Court or Judge, before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and direction to the Jury on the matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases." By the third section it is also provided, "that nothing herein contained shall extend, or be construed to extend, to prevent the Jury from finding a special verdict, in their discretion, as in other criminal cases." And by the fourth section "in case the Jury shall find the defendant or de-

fendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this act any thing herein contained to the contrary notwithstanding."

Depositions taken before* a magistrate are not evidence upon a trial for libel, since the statutes†, by which such are made evidence, extend to the case of felony only. Where a paper is given in evidence as having been written by the defendant, he is entitled to have the whole of its contents read‡.

And when the alleged libel was contained in a newspaper, the defendant was allowed to have an extract from a distinct part of the same paper, but relating to the subject, read§ in evidence.

The defendant acknowledged himself to have been the author of a libel produced in evidence, errors of the press and some small variations excepted, the defendant's Counsel objected that the confession was not absolute, and, therefore, that the libel could not be read; but Pratt, C. J. allowed it to be read, saying he would put it upon the defendant to shew material variances||.

A Gazette is evidence to prove¶ an averment in the information, that certain addresses have been presented to the King.

* R. v. Paine. 5 Mod. 163.

† 1 and 2 P. and M. c. 13. 2 and 3 P. and M. c. 10.

‡ 5 Mod. 163.

§ R. v. Lambert. 2 Camp. 398.

|| R. v. Hall. Str. 416.

¶ R. v. Holt. 5 T. R. 536.

CHAPTER XLI.

Of the Proceedings after the Trial.

THE Court will not, after the defendant's conviction, make an order on the prosecutor to deposit the original libel with the officer of the Court*. After the defendant has been found guilty on a criminal information, it is a matter of course that he should stand committed, pending the consideration of the judgment, unless the prosecutor expressly consent to his standing out upon bail†.

The defendant cannot‡ move for a new trial after the first four days of the next term after conviction; but if it appear to the Court that injustice has been done by the verdict, they will *ex mero motu* interfere after that period and grant a new trial.

The vice of one or more counts is no ground for arresting the judgment§, provided there be one valid count in the information or indictment, though, as already seen, it is otherwise in a civil action, where general damages are given, since in the latter case the Court cannot apportion the damages, and say how much was intended to be given in respect of the defective counts.

* 2 E. R. 361. R. v. Cator.
† R. v. Waddington. 1 E. R. 143.
‡ 5 T R. 436. 1 E. R. 145.
§ R. v. Benfield and Sanders, Burr. 980.

When the defendant is brought up for judgment, affidavits are produced either by the prosecutor or the defendant; and observations concerning them relate either to their contents or to the order in which they are read.

Where a defendant has been convicted, the prosecutor may read affidavits in aggravation, though made by witnesses who were examined at the trial; in which case the defendant will * be at liberty to answer them.

And, where a defendant had † suffered judgment by default, the prosecutor was allowed to read affidavits in aggravation, containing expressions made use of by the defendant, confirming and aggravating his guilt, which had been uttered by him in the hearing of two persons, and by them afterwards related to the persons making the affidavits, the prosecutor having first made affidavit that an application had been made to both those persons to come forward with their testimony, which they had refused, and it appearing to the Court that they were under controul. But the Court allowed the defendant and those persons time to come forward and answer the facts. And such evidence would be inadmissible, unless it appeared that the person refusing to give evidence was‡ under the controul of the defendant.

* R. v. Sharpness. 1 T. R. 228.
† R. v. Archer, 2 T. R. 204.
‡ R. v. Pinkerton, 2 E. R. 357.

To shew the malice of the defendant, it is usual for the prosecutor to state upon his affidavit similar libels published since the conviction*.

After judgment by default in a criminal prosecution, when the defendant is brought up for judgment, each party should come prepared with affidavits, stating his case; and if, in the course of the inquiry, the Court wish to have any point further explained, they will give the defendant an opportunity of answering it on a future day†.

The defendant is, in general, at liberty to introduce any affidavit tending to shew that his act did not result from pure malice, but proceeded from some motive less reprehensible; how far he shall proceed in his statement is, of course, a matter of prudence and discretion to be exercised upon the particular circumstances of the case.

Any reflections upon the prosecutor beyond those conveyed by a bare statement of facts, and any attempt to impugn the credit of the witnesses, or the justice of the conviction, are inconsistent with the situation of the defendant, who stands before the Court as a supplicant for its indulgence, and not in the character of an accuser. Where the

* See R. v. Withers. 3 T. R. 432. Where Ld. Kenyon, Chief Justice, said, "It is well settled that the conduct of the defendant, subsequent to his conviction, may be taken into consideration either by way of aggravating or mitigating the punishment; but the Court will take care not to inflict a greater punishment than the pricipal offence will warrant." The same was ruled in the case of R. v. Walter.

† R. v. Wilson, 4 T. R. 487.

libel has alleged specific charges, it has been held* that the defendant is at liberty to prove the truth of such charges by affidavit, in mitigation of punishment; but this must be done upon a plain statement of circumstances, strictly relevant to the matter charged in the libel, though the defendant might not be considered as confined to rules so strict as those which are observed in civil cases in pleading a justification.

The defendant must, nevertheless, confine himself to facts immediately and strictly connected with the libellous assertion; for, otherwise, he would be able, by a general charge, to put the prosecutor's whole life and conduct in issue, and the proceedings of the Court might be perverted into the means of publishing the most atrocious calumnies with impunity.

The precise purpose of such a statement is to diminish the criminality of the defendant's motive and intention in the eyes of the Court, and to shew that his act did not result from pure malice: this end should be cautiously regarded by the defendant in framing his affidavits, since it is easy to conceive that in some instances an actual statement of facts may serve the more strongly to illustrate his malice, the truth of a publication being by no means conclusive as to the malice of the publisher. Should the affidavit betray any other object beyond the partial exculpation of the

* Dig. L. L. 16. Bac Ab. tit. lib. 456. Per Ld. Mansfield, C. J. R. v. Roberts. B. R. M. 8 G. 2. MSS.

defendant, it would, if not rejected by the Court, (which in all such cases listens to affidavits, in order to inform its conscience, and not as a matter of obligation,) at all events operate to his prejudice.

General evidence, of good character, is always a proper topic to be introduced into affidavits in mitigation.

It is not usual to give the defendant an opportunity of answering at a future day the affidavits produced by the prosecutor, where they do not extend beyond the allegations contained in the indictment, though judgment should have been suffered by default*. But where affidavits are produced to shew a *continuation* of the defendant's malice, the Court has thought it reasonable to allow the defendant an opportunity of answering them, since it cannot be supposed that he comes prepared to answer† that which is not contained in the indictment.

With respect to the order observed in reading affidavits:

When a defendant is brought up to receive judgment after conviction for a libel, his affidavits‡ are first read, and then the prosecutor's; after which, the defendant's counsel are first heard, and then the prosecutor's.

When the defendant is brought up on judgment

* R. v. Wilson, 4 T. R. 487.

† Ib. and R. v. Archer, 2 T. R. 203.

‡ R. Mich. 29 G. 3. Tidd. Pr. 454. 4th Ed.

by default, the prosecutor's affidavits are first read, and then the defendant's; after which the counsel for the prosecution are heard, and then the counsel for * the defendant.

Where there are no affidavits, the defendant's counsel always begin; where judgment is by default, and there are affidavits for the defendant, but none for the prosecution, the defendant's counsel begin†.

Of the punishment.

No offence seems to have been visited with punishments so varied in species and degree, as that which is the subject of the foregoing treatise; a striking proof how difficult it is to estimate its evil consequences, and of the different conceptions which in different communities, have been entertained of their magnitude.

The history of foreign countries exhibits the penalties for this crime in every gradation, from the infliction ‡ of death to the bleeding of the offending§ organ; even in this it has been

* R. Mich. 29 G. 3. Tidd. P. 454. 2 T. R. 683.

† R. v. Finnerty, Hil. T. 1811.

‡ By the law of the Twelve Tables, "Si quis accentasset malum carmen, sive condidisset quod infamiam faxit flagitiumque alteri capital esto." Wood's Civ. L.

§ According to Sir E. Coke, the Lydians bled the slanderer in the tongue, and the listener in the ear, 12 R. 35. By the laws of Alfred, the "Publicum mendacium" was to be punished by the cutting out of the tongue, subject to redemption, juxta capitis æstimationem. Wilk. Leg. An. Sax. 41.

punished with very different degrees of severity, and the history of the Star Chamber records sentences upon libellers whose rigour can scarcely be exceeded: thus Wrennum, for traducing and scandalizing the Lord Chancellor Bacon, in a book delivered to the king, was sentenced by that Court to be *perpetually* imprisoned, to pay a fine of £1,000, to be twice pilloried, and to lose both his ears. Leighton, for his publication, intituled "An Appeal to Parliament, or Sion's Plea against Prelacy," was sentenced to pay a fine of £10,000, to be whipt at the pillory twice, to lose both his ears, to have his nose slit and face branded, and to be imprisoned in the Fleet *during life**. It would be impertinent in this place to refer to other instances; the cases of Prynne, Burton, Bastwick, and other sufferers are too well known in history to bear recital, and their sentences remain lasting and disgraceful memorials of the severity of the tribunal by which they were inflicted.

One of the earliest instances in which a libeller was sentenced to the pillory at common law, appears to have been that of Hugh Baker, who, in the fourth year of Elizabeth was, for publishing a libel upon some of the inhabitants of Chertsey, sentenced to imprisonment, pillory, and to find security for his good † behaviour. Since that period, this mode of punishment at

* 6 C. I. 1631. † 3 Ins. 220.

Common Law has not been unusual, but has seldom been inflicted in modern times, except in cases marked by some peculiar atrocity, and has generally been reserved for the more signal disgrace of those who have been convicted of disseminating profane and obscene libels. As a misdemeanor, at Common Law, the offence is of course punishable by fine and imprisonment, at the discretion of the Court, after a full consideration of all the circumstances, tending either to extenuate or aggravate the guilt of the offender. In addition to this, it is frequently deemed proper to impose upon the offender the condition of finding security for his good behaviour for a limited term, by which expedient the Court are enabled to extend an humane indulgence to the criminal, in respect of the duration of his imprisonment, without compromising their first and great duty to the public, the providing for its future security.

CONCLUSION.

HAVING thus pursued this branch of jurisprudence through its various divisions, it may be permitted, before the subject is dismissed, briefly to consider how far the wisdom of our law has overcome those difficulties which were slightly suggested in the introduction to this treatise. In the first place it is worthy of remark, that no branch of our municipal law, equally difficult and extensive, contains so little intermixture of positive and legislative enactment as that which regulates intellectual intercourse: this portion may be considered as an almost pure derivative from the source of common law, and however complicated it may be in its adaptation to the equally complicated concerns and transactions of society, its elements are few and simple.

Wherever the exigencies of society render it necessary for the legislature to interfere, its prohibitions and prescriptions must necessarily be abrupt and peremptory, and modified very differently from those rules, which, suggested by practical convenience, and sanctioned by experience, are gently and gradually moulded into law, at the discretion of those who preside in our Courts.

The predominant feature which characterizes

this branch of law, is the establishment of malice, as the great essential to both civil and criminal liability. This is the important distinction, which reconciles with the security of the state and the welfare of the individual, that free communication of ideas, for the enjoyment of which man is, by his powers intellectual and physical, admirably qualified: it is this which serves to define the limits of communication in a legal as well as moral sense, and upon this basis of mere abstract immorality, the legal remedies are with wonderful simplicity erected; their mutual connection and relations may be comprised in three sentences.

Any communication made with a malicious intent is immoral.

When such a malicious act produces mischief to the individual it becomes actionable.

When it produces mischief to the public, it becomes indictable.

If the system be viewed still nearer, its minuter provisions have a claim to admiration. To found an action at common law, a wrongful act must, in general, be combined with an actual damage; but to facilitate the remedy against slander, the law, applying itself to the urgency of the case, lays aside its usual strictness; and where the requiring proof of an actual loss would produce evil consequences to the plaintiff, where the presumption of damage is violent, but the difficulty of

proving it considerable, the law supplies the defect, and by converting presumption into proof rescues the character of the sufferer from the misery of delay, and enables him at once to face the calumny in open court.

But inasmuch as this is an indulgence purchased at the price of a departure from a general rule, it is wisely restricted to cases where delay would be pregnant* with danger, and where the calumny is likely to affect the complainant in his liberty, office, or means of livelihood; nor will the law in any case extend redress to a party who has not suffered from slander, *false* as well as *malicious*, and in a spirit of genuine purity carefully excludes from its courts every one whose conduct is infected with the guilt of that charge upon which his complaint is founded.

The elements which constitute the criminal offence, namely, a *malicious* publication *tending* to the detriment of the community, simple as they are, conduce mainly to individual security and public tranquillity. As the natural right of society to prohibit, under penalties, any wilful and overt attempt to produce disorder and confusion is

* To this general rule there is, as has been already observed, a painful exception; it cannot but be considered as a disgrace to this branch of the law, that the reputation of females of every rank should be left exposed to imputations most odious, offensive, and mischievous, though the skill and integrity of the lowest mechanic cannot be reflected upon with impunity.

indisputable, so likewise is the policy which crushes the very seeds of discord and immorality, rather than suffer them to expand and ripen into mischief. Still this preventive vigour is strictly consistent with the most ample degree of liberty in the subject. Every individual in the realm is entitled to publish what he thinks fit independent of previous control, and cannot be deemed a criminal for having published, until a Judge shall have declared his opinion that the publication is illegal, and a Jury of his country shall have decided upon oath, after a consideration of the alleged libel, its tendency, and all the accompanying circumstances, that his intention was malicious, and therefore criminal; and after all he is not debarred from appealing to another tribunal, for the purpose of ascertaining whether that, which after conviction must be taken to have been published with a malicious mind, contains that intrinsic tendency to produce mischief, which constitutes it a libel in the criminal sense.

In these two circumstances, the necessity of a malicious intent, and the mode in which that intent is to be ascertained, is founded the liberty of communication in the most valuable sense of the word; the first forms the plain boundary between right and wrong, which no man, whose intentions are pure, needs fear to transgress; the other assures to him an impartial inquiry into those motives, should they be called in question. What other means could be

devised for securing the liberty and restraining the licentiousness of the press at once so simple and effectual?

No declaimer was ever silly enough to contend that all publications, however malicious, or however mischievous, ought to pass unrestrained; but allowing restraint to be necessary where the intention is *malicious* and *tendency mischievous*, how can the existence of these be best ascertained? It is plain that mere tendency is too subtle in its nature to be defined by human laws; it depends upon circumstances infinitely combined and perpetually fluctuating, admitting no other means of ascertainment, than the application of a strong judgment to the subject matter, its context, and those extrinsic circumstances which are capable of illustrating its meaning: the intention too must be collected from the publication itself, and the accompanying facts; to refer, therefore, the alleged libel and its circumstances to the joint consideration of the Court and a Jury, by which means the latter are put in possession of the legal opinion and experience of the former, and are thereby assisted in forming a correct judgment upon the defendant's intention, appears to be the happiest expedient which ingenuity could suggest for at once arriving at the truth and securing the rights and liberties of the subject.

NOTES.

P. 2.—" The injury could seldom extend beyond," &c.

The rude member of a warlike tribe would quickly resent any reflection upon his courage, strength, or prowess: to restrain such would therefore be one of the earliest efforts exerted by a people beginning to substitute general laws, as the security for good manners, in the place of individual violence. By the ancient law of the Burgundians,

Si quis alterum concagatum clamaverit 120 denariis mulctetur. Si quis vulpeculam alterum clamaverit vel leporem eodem modo mulctetur. "These," as observed by a learned writer, "appear plainly to be the laws of a warlike nation, in which the calling another by a name, which implied cunning or flight, rather than courage and resistance, was thought a heinous infamy." Barrington on the penal statutes. What a different state of society is suggested by the following canon: "Si quis dixerit episcopum podagra laborare anathema sit." Menagian, T. 1. 16. It seems clear, that good breeding and polite manners cannot become the subject matter of legislation, mere injuries to the feelings are too unsubstantial and evanescent in their nature to bear definition; the very tone of voice and expression of countenance in such cases not unfrequently constitute the insult; nay, in some instances, even silence may wound more severely than the most abusive language. Against such affronts no legislative enactment can defend, and it is not difficult to conceive that a high sense of honour is a better security against gross manners than any penal laws, which must necessarily de-

fine the particular insults intended to be restrained, and of course leave a far greater number to be practised with impunity.

P. 20.—" Without proof of special damage," &c.

According to Vaughan, C. J. 2 Vent. 28, at one time no action lay without proof of special damage, unless the slander concerned the plaintiff's life; and it was not actionable to call another a villain, unless it were added he was lain in wait to be seized. The C. J. added, " The growth of these actions will spoil all communications; a man shall not say such an inn or such wine is not good."

P. 27.—" Criminal liability is not always the exclusive ground," &c.

To the confirming instances cited may be added, the class of cases in which it has been held, that a pardon granted after the commission of the offence, but before the speaking of the words, will enable the plaintiff to maintain his action. See Cuddington v. Wilkins, Hob. 81.

P. 31.—" The purpose or intent of a man without action." &c. See also Lord Ellenborough's dictum, 4 Esp. 219.

P. 36.—" To impute incontinency to a female in London," &c.

Such an action is not removeable from London by habeas corpus. Cro. Car. 486.

P. 123.—" Of a member of parliament."

But words otherwise actionable are not the less so because applied to a candidate to serve in parliament. Harwood v. Sir J. Astley in error, 1 N. R. 47.

P. 130.—" Words imputing dishonesty to a tradesman," &c.

In Feise v. Linder, 3 B. and P. 372. The plaintiff stated, that he was a merchant, and had received a bill of lading relat-

ing to certain goods consigned to him, which bill of lading he produced to the defendant, and required the delivery of the goods, when the defendant maliciously published concerning the plaintiff in his business and the premises these words, "He has brought a false bill of lading for half the cargo already."

After a verdict for the plaintiff judgment was arrested on the ground, that the words without special damage were not actionable; but from the report of this case the attention of the Court seems to have been chiefly directed to the question, whether the words were actionable as imputing a crime? and it does not seem to have been much considered, whether they were not actionable as having been spoken *falsely* and *maliciously* concerning a merchant in his business, and tending to injure him in his means of livelihood.

P. 145. Chap. 5.—"Written slander."

Since this chapter was printed, the distinction between oral and written slander has been recognised in the Exchequer Chamber.

Lord Kerry founded his action upon a libel charging him with being a hypocrite, and using the cloak of religion for unworthy purposes. He had a verdict with £20. damages at the Kingston Spring assizes, 1809, and had judgment in the Court of King's Bench without argument, whereupon a writ of error was brought in the Exchequer Chamber. Sir James Mansfield, C. J. on giving judgment for the defendant in error (East. T. 1812) observed, that this was certainly a libel for which the writer might have been indicted, but he had entertained considerable doubts, whether it could be the ground of a civil action? As to a civil action there seemed to be no well-founded distinction between written and unwritten slander. The reasons given in the books for the distinction are very insufficient. One reason is, that by writing the scandal becomes more diffused; but this is casual, for words may be spoken under circumstances which shall give them much more publicity and render them much more injurious than if they were com-

mitted to paper and shewn to a third person; another reason is, that the writing of the scandal shews more malice in the defendant; but the true foundation of a civil action is some damage sustained by the plaintiff, and not the malice which actuates the defendant. It was with great difficulty his Lordship had brought his mind to yield to the authority of the cases upon the subject. There were cases, however, establishing this distinction above a century ago, and dicta to the same effect by Lord Hale, Lord Hardwicke, and other very learned and eminent judges, and the Court could not now venture to overturn a rule sanctioned by the practice of a century, and the authority of so many great names. Judgment affirmed, 3 Camp. 214.

To the cases cited in proof of the distinction may be added, Sir Baptist Hicks's case, Hob. 215.

King of Gray's Inn v. Sir E. Lake, 2 Vent. 28.

Harman v. Delany, Str. 888. D. L. L. 13. In the latter case the Court observed, that if bare words, affecting a man in his trade, were actionable, it would be much stronger in the case of a libel in a public newspaper, which is more diffusive.

P. 159.—" The general rule appears once to have been," &c.

See 1 Buls. 40. and supra p. 22. In 2 Vent. 28, Vaughan, C. J. observed, " in ancient books we do not read of an action for words unless the slander concerned life.

P. 165.—" Riding Skimmington," &c.

It has been held that this practice is not actionable, Lord Raymond. 201; but in 2 Show. 314. it was said, that the carrying a fellow with horns bowing at the plaintiff's door is actionable; and the case of Sir W. Bolton v. Dean was referred to.

P. 184.—" Loss of marriage," &c.

Upon the same grounds it is actionable, falsely and maliciously, to say that a person in treaty to marry is under a precontract, the marriage having by such words been defeated, 11 Mod. 99.; for the loss of marriage is a temporal damage, and

proceeds from the wrong of the defendant, viz. his false and malicious assertion.

P. 200.—" The defendant's malice is immaterial," &c.

So where the plaintiff procures the publication of that on which the complaint is founded. See 3 B. and P. 594. 5 Esp. R. 15. 1 T. R. 110.

P. 205.—" A man may justify in an action for a libel."

A similar opinion was also expressed by Lord Ellenborough, C. J. in the case of Plunkett v. Cobbett, May 1804.

P. 206.—" The justification must be pleaded and proceed with great precision," &c.

See Bell v. Byrne, 13 East. 554. It was there held that an allegation in the plea, that " the plaintiff had been confined in England on a charge of high treason," was not supported by proof that the plaintiff had been apprehended on a warrant from the Duke of Portland, one of the Secretaries of State, on suspicion of high treason. See also R. v. Lofeild, D. L. L. 78. supra p. 228.

P. 208.—" If he had been convicted and pardoned afterwards," &c.

In Searle v. Williams, Hob. 288, Lord Hobart held, that " for an accusation reflecting upon any man for an offence for which he has been indicted, convicted, and had his clergy allowed, an action lies as if he had been acquitted from it." And the same learned Judge also held, that though the statute 18 Eliz. c. 7. required a burning in the hand previous to the prisoner's discharge; yet, that if he had his clergy he would be entitled to all the benefit of the statute, though he should not be burnt in the hand. But it was laid down by Ld. C. J. Treby and his brethren, on the trial of the Earl of Warwick for the murder of Mr. Coote (St. Tr. 11 W. 3.) that when the prisoner

is liable to burning in the hand, the mere allowance of his clergy, without burning in the hand, will not restore the party to his credit. See also Lord Castlemaine's case, 3 St. Tr. 47. But it has been said, that it is sufficient to produce the record whereby clergy was granted, without proving an actual burning. Com. Dig. tit. Testmoigne A. 4. A general pardon after outlawry for felony will not restore credit to the offender, 3 St. Tr. 47.

And it has been said, that a pardon after a conviction for perjury will in no case restore the offender to credit, 1 Vent. 349. 1 Sid. 52.

But by 5 Eliz. c. 9. the disability to give evidence is part of the judgment, and on that account, according to Holt, C. J. (R. v. Crosby, Salk. 689.) cannot be removed by a subsequent pardon. See Co. Ent. 368. Rast. 86.

P. 210.—" No member of either house," &c.

The St. 4 H. 8. c. 8. protecting certain persons from all suits, &c.; for any bill, speaking, or reasoning concerning parliament was held by all the judges to be a particular law. 5 Car. Rush. 662. but the contrary was declared in parliament. Cro. Car. 604.

By a resolution of the Commons, 19 J. 1. no member shall be molested for any thing said or done in parliament, except by the house. See also Cro. Car. 604. Rush. 662, 663. St. 17 C. 2. 1. By St. 1 W. and M. 2. s. 2. it is declared, that freedom of speech and debate, or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

P. 211.—" The same rule applies to judges," &c.

" With regard to judges and jurors the law gives credit to what they do, and therefore there must always, in what they do, be cause for it; the presumption of law is, that judges and jurors do nothing maliciously," per Eyre Baron. 1 T. R. 503.

P. 223.—"Which the usual course of judicial proceeding does not warrant," &c.

In the case R. v. Salisbury, 1 Ld. Ray. 341. it was held by Holt, C. J. that if a man prefer a scandalous petition to the House of Lords, or make an affidavit containing scandal against J. S. in B. R. he cannot justify the publication of this, but it will be an offence indictable, because it tends to a breach of the peace.

P. 264.—"They were spoken by the defendant under a belief of the fact," &c.

But the opinion of the defendant that the plaintiff was guilty, will not justify an extra-judicial charge. Plunkett v. Powell, Cro. Car. 52.

P. 302.—"Publication," &c.

If the plaintiff aver that the hearers understood the words in a particular sense, he will be bound to prove it at the trial. 5 East, 470.

P. 309.—"The statement of the words must correspond with the publication to be proved," &c.

Bell averred that Byrne printed and published, in the Morning Post, the following libel concerning the plaintiff, as purporting to be a letter written from A. to R. O'Connor: "I have sold all my property to B., yet it may still go on in my name, and the rents are to be transmitted to H. Bell, Esq. Charter-house-square. Mr. Bell (meaning the plaintiff) has been for some time past confined in England on a charge of high treason." Upon the trial it appeared that the paragraph in question had been published by the defendant in his newspaper of the 15th of May, 1810, and that it purported to be a statement of a speech delivered by the Attorney-general for Ireland in the Irish House of Commons on the 19th of Feb. 1799, in the course of which several letters were read by him. The defendant objected that the words, "Mr. Bell has been for some time past confined in England on a charge of high treason,"

did not constitute part of the letter alleged to have been read by the Attorney-general, but were published as mere comment by him after reading the letter, and were therefore improperly described in the declaration, as purporting to be part of the letter. And the Court of King's Bench, upon a motion to set aside the verdict for the plaintiff, and enter a nonsuit, were of opinion, that the misdescription was fatal, and that the defendant should have been described as professing to publish a speech of the Attorney-general for Ireland, in which was contained, &c.

P. 355.—" Description of special character," &c.

The plaintiff declared as proprietor, editor, and publisher of a certain newspaper, he proved, that he was the proprietor and publisher, but not the editor, and the variance was considered as fatal. Heriot v. Stuart. 1 Esp. 437.

It is unnecessary to aver, that the plaintiff qualified himself to act in the character in which he sues, in compliance with any particular statute. See Hartley v. Herring, 8 T. R. 131.

P. 369.—" Declaration, damage," &c.

If the plaintiff once recover he cannot afterwards maintain an action for any special damage subsequently resulting from the same words. B. N. P. 7. Tamen qu. 2 Mod. 151. contra.

Where the words are actionable, special damage, though averred, need not be proved. Cook v. Field. 3 Esp. R. 133.

P. 370.—" Defendant's plea," &c.

A plea of justification will sometimes cure a defective declaration. The words were, " He is forsworn," and there was no colloquium to connect them with a judicial oath, but the plea averred them to have been spoken in reference to a judicial oath, and thereby cured the defect. Cro. Car. 288.

P. 386.—" The defendant must in his plea charge him with specific instances," &c.

A defendant is not at liberty to charge the plaintiff with swindling, unless he can prove specific instances, 1 T. R. 748.

So in Holmes v. Catesby, Taunt. R. 543, where the libel charged the plaintiff, an attorney, with general misconduct, such as negligence, falsehood, prevarication, &c. a plea repeating the same general charges, without specifying any particular instances of misconduct, was upon demurrer held to be insufficient.

P. 417.—" Liability of booksellers," &c.

In the case of R. v. Walter, 3 Esp. 21, the libel was contained in a newspaper of which the defendant was the proprietor. He proved that he resided in the country, and took no share in the management of the paper; but Ld. Kenyon, C. J. held, that the proprietor of a newspaper is answerable criminally as well as civilly for the misconduct of his servants in managing the paper, and observed that this was the opinion of Lord Hale, Justice Powell, and Mr. Justice Foster.

Upon the trial of an information for publishing a seditious libel, evidence was admitted, that the servant, in the defendant's shop, wore a cap with the words " liberty and equality" upon it. R. v. Holt, 5 T. R. 436.

P. 448.—" Evidence of malice," &c.

So in Tate v. Humphreys, 2 Camp. 73. in an action for words of perjury, the plaintiff was permitted to give in evidence a bill of indictment which had been subsequently preferred against him by the defendant. See also Carr v. Hood, 1 Camp. 354. and supra, p. 639. R. v. Ball, 1 Camp. 324. But in the case of Finnerty v. Tipper, 2 Camp. 72. Sir J. Mansfield, C. J. held, that libels published since that on which the action is founded are not admissible in evidence unless they refer to the same subject matter.

P. 453.—See B. N. P. 14.

P. 456.—" Having referred to," &c.

The defendant's counsel is entitled to read to the Jury speculative opinions which have been published, and which relate to the matter in question, but they cannot be read to prove any fact, unless afterwards offered in evidence. 5 Esp. 138.

The defendant, under an indictment, is not at liberty to prove that other persons before that time had published similar libels without being prosecuted, least a person should be deemed guilty of having published a libel without having had an opportunity of defending himself. 5 T. R. 436.

P. 462.—" Evidence for the defendant," &c.

The defendant may prove in mitigation of damages, though not in bar of the action, that the plaintiff has published libels against him, Finnerty v. Tipper, 2 Camp. 77.

P. 497.—St. 1 E. 6. c. 1. By this statute the justices at Sessions are authorized to issue a writ to the Bishop of the diocese to attend the sessions, either in person or by his deputy, " sufficienter eruditus," to inquire into the offence committed against the sacrament. And, by the same statute, the defendant is allowed to purge or try his innocency, by witnesses equal in number and honesty to those who depose against him.

P. 500.—" Publications subversive of morality," &c.

Within this division fall the offences of profane cursing and swearing, but since the legal prohibitions relating to these are well known, they have been omitted, and the reader is referred to Burn's Justice, tit. Swearing.

P. 533.—" No indictment lies for words spoken either of or to inferior magistrates, unless," &c.

See R. v. Wrightson, Salk. 697. Ld. Ray. 153. 1030. Holt. R. 354. 364. 5 Mod. 203. The Queen v. Nun. 10 Mod. 186. 11 Mod. 166. 12 Mod. 98. 514. R. v. Walden. 414.

Lord Holt, C. J. held, that though an insolent witness might be committed by the Court for a contempt, he could not be indicted. 7 Mod. 28. But see Str. 420.

P. 534.—See also the case of R. v. Smith, who instructed Stephen Colledge to say, on his trial at Oxford, that " Government might as well have hanged him at Tyburn, as he came by, as brought him thither to murder him with a little more formality." Skinn. 124.

P. 543.—" By St. 23 Eliz. c. 2. it was made felony to cast the nativity of the Queen. The taking a portrait of her was also for bidden by proclamation."

P. 548.—" Unless they amount to a direct breach of the peace, as by a challenge to fight," &c.

The terms *liar* and *rogue* are not indictable when spoken, because (as is said) they do not immediately tend to a breach of the peace, 4. Ins. 181.

Notwithstanding this authority, it would not be easy to select two other words in the language which do so efficaciously tend to a breach of the peace, or which have, in fact, been so frequently the forerunners of blows, as the two alluded to. The reason for tolerating such oral but tempting incitements to violence, seems to be the well-grounded apprehension, that, to subject the speakers of abusive words to punishment, would be to cherish a spirit of petty litigation, the inconvenience of which would outweigh the mischief intended to be remedied. The experiment was made with respect to actions (vid. p. 22), but the Judges were quickly induced to abandon the rule they had laid down, which does not seem ever to have been extended in the same latitude to the criminal offence; and Lord Holt observed, that to encourage indictments for words would render them as uncertain as actions for words are. See p. 548.

By St. 9 Ann. c. 14. 1. 8. in case any person shall challenge another, or provoke him to fight, on account of money won at play, he shall, upon conviction, forfeit all his goods and chattels and personal estate whatsoever, and shall suffer imprisonment for two years. See Haw. P. C. b. 1. c. 72. s. 42.

P. 551.—" On the memory of one dead," &c.

See also R. v. Walter, 3 Esp. 21.

P. 552.—" Upon the character of any particular individual."

An indictment for a libel on several persons, to the jurors unknown, is bad. R. v. Orme (or Alme) and Nut. Ld. Ray. 486. 2. Salk. 224.

But where a libel reflects upon one of a specific body, with-

out naming him, the publisher may be indicted for a libel upon the whole. R. v. Jenour, 7 Mod. 400.

And an information has been granted for charging one of several Trustees with a breach of private trust. R. v. Griffin and others. Rep. Temp. Haw. 39.

P. 565.—" The keeping of such libels in possession," &c.

Where a libel is found in a man's own custody, but exposed, as on a shelf in a bookseller's shop, the owner is guilty of a publication. 12 Vin. Ab. 229. 4 Read. St. L. 155.

P. 599.—" Application for an information," &c.

When the same libel reflects on several, it is not necessary that all should join in the application, or that the names of all should be specified, since the conviction upon one information would be a bar to any other, it being one single offence, though every person injured would severally be entitled to maintain an action. R. v. Griffin, Rep. Temp. Hardwicke, 39.

P. 599.—" The applicant must waive his right of action." &c.

The party may be put to his election before the information is granted; after the granting of an information, it is of course to stay the proceedings in an action for the same cause. 2 T. R. 198.

P. 604—" Upon a warrant from a Secretary of State," &c.

In the case of the King v. Kendal and Roe, Salk. 347. the Court held, that Secretaries of State might commit as conservators of the peace at Common Law, and that the commitment to a messenger was good, and a lawful custody; for they would intend it only to carry him to gaol. But the party, in that case, was committed on a charge of treason.

P. 605.—" But by the resolutions of both Houses of Parliaiament," &c.

Journal of the Lords, Die Martis, 29 Novembris 1763. The 3d resolution of the House of Commons was read; Resolved by the Commons in Parliament assembled, that privilege of

parliament does not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the ordinary course of the laws in the speedy and effectual prosecution of so heinous and dangerous an offence; and it being moved to agree with the Commons in the said resolution, it was, after a long debate, resolved in the affirmative.

P. 606.—"The single point decided was," &c.

But Lord Mansfield, C. J. expressed himself in strong terms against the legality of general warrants, and cited the opinions of Wilmot, Yates, and Aston, Justices, in support of his own. 11 St. Tr. 312.

P. 613.—"Form of information or indictment."

Where two persons concur in the same illegal act, they may be included in the same indictment.

In the case of R. v. Benfield and Sanders, 2 Burr. 980. it was held, that an information lay against two for singing a libellous song on A. and B., which first abused A. and then B. And it was said, that had the defendants sung separate stanzas, the one reflecting on A. and the other on B., the offence would still have been entire.

A libel upon one of a body of persons without naming him, is a libel upon the whole, and may be so described. The defendant published the following advertisement in a newspaper: "Whereas an East India Director has raised the price of green tea to an extravagant rate, the same gentleman being also concerned with the Swedish East India Company; the English proprietors hope he will find some measure to raise bohea tea in Sweden, that the Company may have an opportunity to ship off some of their bad bohea tea, instead of having it burnt as usual." Upon motion for an information, Lee, C. J. observed, "Where a paper is published, equally reflecting upon a number of people, it reflects upon all, and readers, according to their different opinions, may apply it so." R. v. Jenour, 7 Mod. 400.

FINIS.

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